TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted] 213

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

SINCLAIR REFINING COMPANY.

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petition certiorari filed December 1, 1921.
Writ of certiorari filed January 21, 1922.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 630.

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

SINCLAIR REFINING COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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1 In the United States Circuit Court of Appeals for the Seventh Circuit.

SINCLAIR REFINING COMPANY, A CORPORATION, petitioner, *vs.* FEDERAL TRADE COMMISSION, RESPONDENT.	No. 2838.

Order authorizing filing and service of petition to review order of Federal Trade Commission.

Now this day comes Sinclair Refining Company, a corporation, petitioner, by its solicitors, Edw. H. Chandler, Roy T. Osborn, and W. Ray Allen, and presents its petition to review an order to cease and desist entered against the petitioner by Federal Trade Commission on the 14th day of October, A. D. 1919, in a cause pending before said commission entitled Federal Trade Commission v. Sinclair Refining Company, bearing docket No. 334.

The court being advised in the premises, it is ordered that said petition to review be filed and that a copy of said petition be forthwith served upon said Federal Trade Commission and that said Federal Trade Commission upon service of such copy forthwith certify and file in this court a transcript of the record in said cause.

Dated at Chicago, Illinois, this 3rd day of May, A. D. 1920.

GEO. F. PAGE, *Circuit Judge.*

(Endorsed:) No. 2838. In the U. S. Circuit Court of Appeals for the 7th Circuit. Sinclair Refining Company, a corporation, petitioner, vs. Federal Trade Commission, respondent. Order authorizing filing and service of petition to review order of Federal Trade Commission. Filed May 3, 1920. Edward M. Holloway, clerk.

2 In the United States Circuit Court of Appeals for the Seventh Circuit.

SINCLAIR REFINING COMPANY, A CORPORATION, petitioner, *vs.* FEDERAL TRADE COMMISSION, RESPONDENT.	No. ——.

Petition to review order of Federal Trade Commission.

To the Honorable Judges of said Court:

Your petitioner, Sinclair Refining Company, respectfully represents that it now is and has been for a period of more than three years next preceding the filing of this petition a corporation organized and existing under the laws of the State of Maine and authorized by law to transact business in the State of Illinois in this circuit, and that

it now is and has been at all times during said period carrying on business in the State of Illinois and in the other States comprising this circuit; that said business consists of the refining of petroleum and the marketing of the products thereof.

That on the 18th day of July, A. D. 1919, Federal Trade Commission issued its complaint before Federal Trade Commission against your petitioner alleging, in substance, that your petitioner's method and practice of leasing and loaning oil pumps and storage tanks or containers was in violation of section five (5) of an act of Congress approved September 26, 1914, and section three (3) of an act of Congress approved October 15, 1914, and requiring your petitioner to make answer and show cause why an order should not be entered by Federal Trade Commission requiring your petitioner to cease and desist from the violations of law charged in said complaint. A true copy of said complaint is hereto attached, made a part hereof, and marked "Exhibit A."

That within the time prescribed by said commission your petitioner filed with its answer to said complaint denying generally and specifically the allegations of said complaint charging violations of the sections of the statutes in said complaint specified; and also
3 alleging certain specific grounds in defense of and justification for the business methods and practices of your petitioner in the leasing and loaning of oil pumps and storage tanks or containers. A true copy of said answer is hereto attached, made a part hereof, and marked "Exhibit B."

That upon the issues thus joined said cause was heard before said commission in the city of Washington, District of Columbia, on the 26th, 27th, and 29th days of September, A. D. 1919, and in the hearing evidence was introduced on behalf of said commission and a stipulation of facts was entered into by counsel for the respective parties and filed in said cause, which said evidence and stipulation of facts and the contents thereof will more fully appear upon the filing of a transcript of the record of said cause by Federal Trade Commission in this court as by statute provided, and which evidence and stipulation of facts your petitioner prays may be deemed a part of this petition to the same intent and purpose as if same were herein set out in full; and upon said evidence and stipulation of facts said cause was submitted to said commission and by the commission taken under advisement.

That thereafter and on the 14th day of October, A. D. 1919, Federal Trade Commission made its report, findings, and conclusions and issued and caused to be entered in said cause its order directing your petitioner to cease and desist from:

"1. Directly or indirectly leasing pumps or tanks, or both, and their equipment for storing and handling petroleum products in the furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of the same after making due allowance for depreciation and other items usually considered when

leasing property for the purpose of obtaining a reasonable profit therefrom, and from doing any matter or thing which would have the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made.

"2. Entering into contracts or agreements with dealers of its petroleum products or from continuing to operate under any contract or agreement already entered into whereby such dealers agree or have an understanding that as a consideration for the leasing to them of such pumps and tanks and their equipments the same shall be used only for storing or handling the products of respondent, and from doing anything having the same unlawful effect as that resulting
4 from the practice herein prohibited and by reason of which this order is made.

"Provided, however, that as to such pumps and tanks and equipments as are now leased by respondent contrary to the orders contained in paragraphs 1 and 2 herein, respondent shall have four months from the date hereof to enter into new contracts or agreements with respect to the same which shall not be incompatible with the spirit and intent of this order.

"It is also ordered, under and by virtue of the authority conferred on the commission by paragraph B of section 6 of "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, that the said Sinclair Refining Company, respondent, shall within 20 days after the expiration of the time allowed within which respondent shall have fully complied with the order to cease and desist, hereinabove set forth, report in writing to the Federal Trade Commission, fully setting forth the nature of the changes made in the conduct of its business with respect to the subject matter involved in the order to cease and desist, and shall be set forth in such report in complete detail the plan or plans adopted for the lease, loan, gift, or sale of any oil tanks and pumps for use in storing refined oil or gasoline, which plan or plans are in use or are proposed to be put in use, and also attach to such report any contracts used by the respondent in the conduct of such business."

A true copy of said report, findings, and conclusions and said order to cease and desist are hereto attached, made a part hereof, and marked "Exhibit C."

That on about March 3, 1920, and within the limitation periods contained in Federal Trade Commissions' said order, your petitioner filed with said commission its motion for rehearing and review and to set aside said order to cease and desist, specifying therein certain grounds therefor. That in said motion your petitioner prayed an opportunity to be heard in support thereof either by oral argument or written brief, but your petitioner was denied opportunity so to be heard. A true copy of said motion is hereto attached, made a part hereof, and marked "Exhibit D."

That on or about March 3, 1920, and within the limitation periods contained in Federal Trade Commissions' said order, your petitioner

filed with said commission its motion to suspend said order to
5 cease and desist, specifying therein certain grounds therefor, as will more fully appear from a true copy of said motion hereto attached, made a part hereof, and marked "Exhibit E."

That on or about March 3, 1920, and within the limitation periods contained in Federal Trade Commission's said order, your petitioner filed with said commission its application for extension of time to comply with said order to cease and desist, pending the hearing on said motions, and specifying therein certain grounds therefor, as will more fully appear from a true copy of said application hereto attached, made a part hereof, and marked "Exhibit F."

That your petitioner's said motion for rehearing and review and to set aside said order to cease and desist and said motion to suspend said order to cease and desist were denied by Federal Trade Commission and your petitioner was by said commission granted an extension for a period of sixty days beyond the time originally fixed in said order within which to make and file its report to said commission as required by said order, as appears from a communication of the chief counsel of said commission dated the 24th day of March, 1920, a true copy of which is hereto attached, made a part hereof, and marked "Exhibit G."

Your petitioner further represents that said order to cease and desist is erroneous and should be reviewed, reversed and set aside for many apparent errors and imperfections inasmuch as it appears from the record in said cause that Federal Trade Commission was without jurisdiction to hear, consider and determine the matters and things in its said complaint contained; that no unfair method or methods of competition in commerce are averred or alleged against your petitioner in said complaint; that no proof was made in said cause of any unfair method or methods of competition in commerce by your petitioner; that the findings of said commission as to the facts are not supported by testimony, and that no order to cease and desist should have been made or grounded thereon; but that said complaint should have been dismissed for the reasons aforesaid and for the reasons specifically set forth as follows:

1. The findings, conclusions, and order of the commission are:
   (a) Not supported by the evidence.
   (b) Contrary to the evidence.
   (c) Contrary to law.

2. There is insufficient evidence to support the finding, and
6 the commission erred in finding, that in the handling of oil pumps and storage tanks or containers, there is conducted by your petitioner a constant current of trade between various States of the United States and a transportation by your petitioner of said devices in interstate commerce.

3. It is immaterial to the issues of this cause, and it was error for the commission to find, that your petitioner leases and loans and has leased and loaned devices and equipment for storing and handling its products at an for monetary considerations below the

cost of purchasing and vending the same, when the business of leasing or loaning said devices and equipment and the returns received thereon are considered separate and apart from the general business and sales policy of your petitioner.

4. It is immaterial to the issue of this cause, and it was error for the commission to find:

(a) That your petitioner's form of contract set forth in said order provides that your petitioner's pumps, tanks or containers, and other equipment shall be used by the lessee only for the purpose of holding and storing your petitioner's petroleum products.

(b) That a small proportion of your petitioner's lessees handle similar products of your petitioner's competitors.

(c) That only a small proportion of your petitioner's lessees as handle similar products of your petitioner's competitors require or use more than a single pump outfit in the conduct of their business.

(d) That the practice of leasing said device requires a large capital investment.

(e) That many competitors of your petitioner do not possess sufficient capital and are not able to purchase or lease devices as your petitioner does, partly by reason of which such competitors have lost numerous customers to your petitioner.

5. There is insufficient evidence to support the finding, and the commission erred in finding, that the effect of the practice of leasing by contract such equipment, where such contract contains a provision restricting the use of the same to the storage and handling of your petitioner's products, may be to substantially lessen competition and tend to create for your petitioner a monopoly in the business of selling petroleum products.

6. There is insufficient evidence to support the commission's finding and conclusion that the methods of competition and the business practices set forth in the commission's findings as to the facts are unfair methods of competition in interstate commerce; and the commission erred in finding that the same are unlawful.

7. The commission erred generally in making and issuing herein its order to cease and desist directed to your petitioner; and it erred specifically in ordering your petitioner:

(a) To discontinue leasing pumps or tanks, or both, and their equipment for storing and handling petroleum products in the furtherance of your petitioner's petroleum business at a nominal rental, or at a rental that does not yield a monetary profit, when considered separate and apart from the general business and sales policy of your petitioner.

(b) To not enter into contracts or agreements, and to discontinue operating under any contract or agreement already entered into, whereby the lessees agree or have an understanding that the pumps and tanks and their equipment shall be used only for storing and handling of products of your petitioner.

8. The commission is without jurisdiction over the subject matter of said complaint and order.

9. The order of the commission is contrary to law, is inequitable and unjust:

(a) The commission is without jurisdiction to make said order.

(b) Said order is not uniform in its application or effect, and works a preference for those against whom an order has not been made and for those whom the commission has not sought to exercise its jurisdiction.

(c) The order of the commission tends to restrain and restrict trade, restrict competition, and produce a monopoly.

(d) The order of the commission is against public interest.

10. The commission erred in assuming that the proceeding herein would be to the interest of the public.

11. The commission erred in issuing and promulgating its order herein against your petitioner until it had heard and determined all the causes of like character pending before the commission.

For all of which errors and imperfections in said order to cease and desist appearing upon the face of the record in said cause, your petitioner has brought this petition for review to be relieved in the premises.

8 Forasmuch, therefore, as your petitioner is without remedy in the premises except in this court, as by statute in such case made and provided, and to the end that said Federal Trade Commission may be required to certify and file in this court a transcript of the record of said cause as provided by statute, and that the said order to cease and desist may be reviewed, reversed and set aside and no further proceedings taken thereon, and that your petitioner may have such other and further relief in the premises as the equities of the cause may require and as to your honors may seem meet.

May it please your honor to have a copy of this petition forthwith served upon said Federal Trade Commission and that said Federal Trade Commission be required, upon service of such copy, to forthwith certify and file in this court a transcript of the record of the said cause.

SINCLAIR REFINING COMPANY.
By EDW. H. CHANDLER
ROY T. OSBORN
W. RAY ALLEN,
Its Solicitors.

Address: 111 West Washington St., Chicago, Illinois.

EDW. H. CHANDLER,
ROY T. OSBORN,
W. ROY ALLEN,
Solicitor for Petitioner.

EXHIBIT A.

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 18th day of July, A. D. 1919.

Present: John Franklin Fort, chairman, Victor Murdock, Huston Thompson, William B. Colver, commissioners.

FEDERAL TRADE COMMISSION
vs.
SINCLAIR REFINING COMPANY. } Docket No. 334.

Complaint in the matter of the alleged violation of section 5 of the act of Congress approved September 26, 1914, and section 3 of the act of Congress approved October 15, 1914.

I.

The Federal Trade Commission, having reason to believe, from a preliminary investigation made by it, that the Sinclair Refining Company, hereinafter referred to as the respondent, has been using unfair methods of competition in interstate commerce, in violation of the provisions of section 5 of the act of Congress, approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint, stating its charges in that respect on information and belief as follows:

PARAGRAPH ONE. That the respondent, Sinclair Refining Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maine, with its principal office and place of business located at the city of Chicago, in the State of Illinois; that for more than four years last past respondent has been engaged in the business of purchasing and selling refined oil and gasoline and the leasing and loaning of oil pumps, storage tanks or containers, and their equipments, in various States of the United States and the District of Columbia in competition with numerous persons, firms, corporations, and copartnerships similarly engaged.

PARAGRAPH TWO. That the respondent, in the conduct of its business, as aforesaid, and as hereinafter more particularly described, purchases refined oil and gasoline, hereinafter referred to as "products," and also purchases oil pumps, storage tanks or containers, hereinafter referred to as "devices," the said devices being used to contain said products, the said products and devices then being handled and stored in the various States of the United States and transported in interstate commerce; that the aforesaid products

are sold and the aforesaid devices are leased or loaned by respondent to various persons, firms, corporations, and copartnerships: that in the conduct of its business of purchasing and selling such products and selling, leasing, or loaning such devices the same are constantly moved from one State to another by respondent and there is conducted by respondent a constant current of trade in such products and devices between various States of the United States: that there are numerous competitors of respondent who, in the conduct of their business in competition with respondent, purchase similar products and purchase and manufacture similar devices, the said devices being used to contain said products, the said products and devices then being handled and stored in the various States of the United States and transported in interstate commerce; that the aforesaid products are sold and the aforesaid devices sold, leased, or loaned by such competitors of respondent to various persons, firms, corporations, and copartnerships; that in the conduct of their business, as aforesaid, competitors of respondent constantly move such products and devices from one State to another and there is conducted by said competitors a constant current of trade in such products and devices between the various States of the United States; that respondent and many of its competitors have conducted their said business in a similar manner to that above described throughout the past four years.

PARAGRAPH THREE. That respondent in the conduct of its business, as aforesaid, with the effect of stifling and suppressing competition in the sale of the aforesaid products and in the sale, leasing, or loaning of the aforesaid devices and other equipments for storing and handling the same, and with the effect of injuring competitors who sell such products and devices, has within the four years last past sold, leased, or loaned and now sells, leases, or loans the said devices and their equipment for prices or considerations which do not represent reasonable returns on the investments in such devices and their equipments; that many such sales, leases, or loans of the aforesaid devices are made at prices below the cost of producing and vending the same; that many of such contracts for the lease or loan of such devices and their equipments provide or are entered into with the understanding that the lessee or borrower shall not place in such devices, or use in connection with such devices and their equipments, any refined oil or gasoline of a competitor; that only a small proportion of the dealers in gasoline and refined oil under such agreements and understandings deal also in similar products of respondent's competitors and that only a small proportion of such dealers require or use more than a single pump outfit in the conduct of their said business; that there are numerous competitors in the sale of such products who are unable to enter into such lease agreements or understandings because of the large amount of investment required to carry out such lease agreements as a competitive method of selling refined oil and gasoline; that there are numerous other competitors of respondent engaged in the manufac-

ture and sale of devices and their equipments who do not deal in refined oil and gasoline, and therefore do not sell or lease said devices and their equipments for a nominal consideration on a condition or understanding that their products only are to be used therein; that the said numerous competitors who were unable to enter into such lease agreements or understandings, as aforesaid, have lost numerous customers in the sale of refined oil and gasoline to respondent because of the business practices of respondent hereinbefore set forth; that the said numerous other competitors of respondent who manufacture and sell said devices and their equipments, but do not sell refined oil and gasoline, as aforesaid, have lost numerous customers and prospective customers for the purchase of their devices and equipments because of the said business practices of respondent, as hereinbefore set forth.

II.

The Federal Trade Commission, having reason to believe from a preliminary investigation made by it, that the Sinclair Refining Company, hereinafter referred to as the respondent, has been using unfair methods of competition in interstate commerce, in violation of the provisions of section 3 of the act of Congress, approved October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint, stating its charges in that respect on information and belief as follows:

PARAGRAPH ONE. That the respondent, Sinclair Refining Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maine, with its principal office and place of business in the city of Chicago, in the State of Illinois; that for more than four years last past respondent has been engaged in the business of purchasing and selling refined oil and gasoline and the leasing of oil pumps and storage tanks and their equipments in various States of the United States and the District of Columbia, in competition with numerous persons, firms, corporations, and copartnerships similarly engaged.

PARAGRAPH TWO. That the respondent in the conduct of its business, as aforesaid, and as hereinafter more particularly described, purchases refined oil and gasoline, hereinafter referred to as "products," and also purchases oil pumps, storage tanks or containers, hereinafter referred to as "devices," the said devices being used to contain said products, the said products and devices then being handled and stored in the various States of the United States and transported in interstate commerce. That such products are sold, and such devices, sold, leased, or loaned by respondent to various persons, firms, corporations, and copartnerships; that in the conduct of its business of purchasing and selling such products and selling, leasing, or loaning such devices, the same are constantly moved from one

State to another by respondent, and there is conducted by respondent a constant current of trade in such products and devices between the various States of the United States; that there are numerous competitors of respondent who in the conduct of their business
13 in competition with respondent purchase similar products and purchase and manufacture similar devices, the said devices being used to contain said products, the said products and devices then being handled and stored in the various States of the United States and transported in interstate commerce; that such products are sold and the aforesaid devices sold, leased, or loaned by said competitors in competition with respondent to various persons, firms, corporations, and copartnerships; that in the conduct of such business, as aforesaid, respondent's competitors constantly move such products and devices from one State to another and there is conducted by said competitors of respondent a constant current of trade in such products and devices between the various States of the United States; that respondent and many of its competitors have conducted their said businesses in a similar manner to that above described throughout the four years last past.

PARAGRAPH THREE. That the respondent for four years last past in the conduct of its business as aforesaid has leased and made contracts for the lease and is now leasing and making contracts for the lease of said devices and their equipments to be used within the United States, and has fixed and is now fixing the price charged therefor on the condition, agreement, or understanding that the lessees thereof shall not purchase or deal in the products of a competitor or competitors of respondent; and that the effect of such leases or contracts for lease, and conditions, agreements, or understandings may be and is to substantially lessen competition and tend to create a monopoly in the territories and localities where such contracts are operative.

Therefore, notice is hereby given you, the said Sinclair Refining Company, that the charges of this complaint will be heard by the Federal Trade Commission at its office in the city of Washington, D. C., on the 15th day of September, A. D. 1919, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as the same may be reached, at which time and place you shall have the right to appear and show cause why an order should not be entered by the Federal Trade Commission requiring you to cease and desist from the violations of law charges in this complaint.

And you will further take notice that within thirty (30) days after the service of this complaint you are required to file with the commission an answer in conformity with Rule III of the Rules of Practice before the commission.

14 In witness whereof, the Federal Trade Commission has caused this complaint to be issued, signed by its secretary, and

official seal to be affixed hereto at the city of Washington, D. C., is 18th day of July, A. D. 1919.
By the commission.

(Signed) J. P. YODER,
Secretary.

(Signed) CLAUDE R. PORTER,
Chief Counsel for the Commission.

(Endorsed as follows:) United States of America. Before Federal Trade Commission. Docket No. 334. Federal Trade Commission v. Sinclair Refining Company, Respondent. Complaint In the matter of the alleged violation of section 5 of an act of Congress approved September 26, 1914, section 3 of an act of Congress approved October 15, 1914.
And notice of hearing thereof at the office of the Federal Trade Commission in the city of Washington, D. C., on the 15th day of September, 1919, at 10.30 o'clock a. m.

EXHIBIT B.

UNITED STATES OF AMERICA
Before Federal Trade Commission, ss:

FEDERAL TRADE COMMISSION
vs.
SINCLAIR REFINING COMPANY. } Docket No. 334.

In the matter of the alleged violation of section 5 of the act of Congress approved September 26, 1914, and section 3 of act of Congress approved October 15, 1914.

Answer to the complaint.

I.

PARAGRAPH ONE. Comes now the respondent, Sinclair Refining Company, and for answer to the first count of the complaint of the Honorable the Federal Trade Commission filed herein, denies each and every allegation thereof, except such as are hereinafter admitted.
PARAGRAPH TWO. Answer paragraph one of count one of said complaint, respondent admits that it is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maine, with its principal business office located at the city of Chicago, in the State of Illinois, and is and has been engaged in the business of purchasing and selling refined oil and gasoline, hereinafter referred to as "products," as well as the general refining of oils and the marketing of refinery products, and further admits that it is now and has been engaged in the leasing and loaning of oil pumps, storage tanks, oil containers and their equipment, hereinafter referred to as "devices," in various states of the United States, (but not in the District

of Columbia) in competition with numerous other persons, firms, corporations, and copartnerships similarly engaged, but alleges that prior to the 25th day of January, 1917, the corporate name of respondent was the Cudahy Refining Company.

PARAGRAPH THREE. Answering paragraph two of count one of said complaint, respondent admits the allegations thereof with the exception of the allegation that it has been *n*egaged in the business mentioned for a period of the past four years, and alleges the fact
16 to be that its business existence began, under the name which respondent now bears, on the 25th day of January, 1917, as alleged in paragraph two of this answer.

PARAGRAPH FOUR. (*a*) Answering paragraph three of count one of said complaint, respondent admits that it does now lease and loan and has for the period of its business existence leased and loaned devices and equipment for storing and handling its products, and that the considerations received by respondent do not in all instances represent reasonable returns upon the investment in such devices and equipment, and also that such leases and loans of said devices and equipment are at times made at prices below the cost of purchasing and vending the same, when the business of leasing or loaning said devices and equipment and the returns received thereon are considered separate and apart from the general business and sales policy of the respondent.

(b) Further answering, respondent states that it has no knowledge of the cost to the manufacturer of producing and vending said devices and equipment.

(c) Further answering, respondent denies that its practice and custom of leasing and loaning said devices and equipment as hereinset forth has the effect of stifling and suppressing competition or of injuring competitors who sell the products and devices mentioned in said complaint.

(d) Further answering, respondent states that its form of contract with the users of such devices and equipment provides in substance that the same shall be used by such party for the sole purpose of storing and handling gasoline supplied by respondent, and for the information of this honorable commission the form of respondent's contract with such users, styled "Equipment Contract", reads as follows:

"Sinclair Refining Company.

"Equipment Contract.

"This agreement, made and entered into this _____ day of _____, 19__, between Sinclair Refining Company of _____ party of the first part, and _____ of the city of _____ State of _____, party of the second part, witnesseth:

"Whereas, party of the second part is now being supplied
17 with gasoline by the party of the first part and desires to install on his premises situated at _____ the following equipment for the better storing and handling of such gasoline: _____

"Now, therefore, in consideration of the premises and of the sum f one dollar by the party of the second part to the party of the st part (the receipt of which is hereby acknowledged), the above- med parties do hereby agree as follows:

"1. The above-described equipment shall be used by party of the cond part for the sole purpose of storing and handling the gasoline pplied by party of the first part.

"2. The party of the second part agrees, at his own cost, to main- in said equipment in good condition and repair so long as he shall ntinue to use same.

"3. The party of the second part agrees that he will not encumber r remove said equipment, or do or suffer to be done anything ereby said equipment or any part thereof may be seized, taken execution, attached, destroyed, or injured, or by which the title the party of the first part thereto may in any way be altered, stroyed, or prejudiced.

"4. In the event party of the second part should at any time use d equipment for any other purpose than the storing and handling gasoline supplied by the party of the first part, or should cease r ------ days to handle gasoline secured from the party of the st part the right or license of the party of the second part to said ipment shall at once terminate, and thereupon party of the first t shall have the right to enter upon said premises and remove d equipment and every part thereof.

"5. The party of the second part shall indemnify and save harm- s the party of the first part of and from any liability for loss, mage, injury, or other casualty to persons or property caused or sioned by any leakage, fire, or explosion of gasoline stored in d tank or drawn through said pump.

"6. This agreement shall terminate forthwith upon the sale or r disposition of said premises by party of the second part, and ny event upon the expiration of ---------- months from the e hereof; and in the event that by mutual consent said equip- ment remains in the possession of party of the second part at the expiration of said period, it is agreed that the same shall be used by party of the second part subject to all of the ns and conditions of this agreement, and such may be termi- ed at any time after the expiration of ---------- months from date hereof by the party of the first part giving ten days notice hat effect. Upon the termination of this license by whatever ns effected, the party of the first part shall have the right to r upon said premises and remove the said equipment and each every part thereof; provided, however, that the party of the nd part shall have the right and option at such time to pur- e said equipment by paying therefor the sum of ----------.

This contract is executed in triplicate, and it is agreed that the ract held by the party of the first part is to be considered the nal and to be the binding agreement in case the duplicate varies it in any particular.

"In witness thereof, the parties hereto have caused this agreeme to be executed the day and year first above written.

"SINCLAIR REFINING COMPANY,

"By _____,

"*Party of First Part.*

"_____,

"*Party of Second Part.*

"_____"

(e) Further answering, respondent states that it does not hav definite information as to what proportion of dealers in gasoline an refined oil who have been supplied with devices and equipment b respondent, as above stated, deal also in similar products of respon ent's competitors, nor of the proportion of such dealers who requir or use more than a single pump outfit in the conduct of their bus ness; further, that respondent has no information as to the numbe of its competitors, if any, who are unable to enter into such agre ment; further, that respondent has no knowledge as to whether ther are numerous, or any, other competitors of respondent engaged i the manufacture of such devices and equipment who do not deal i refined oil and gasoline, and who do not sell or lease such device and equipment for a nominal consideration on a condition or under standing that their products only are to be used therein; further

that respondent has no knowledge that numerous, or any com

19 petitors who are unable to enter into such lease agreements o understanding have lost numerous, or any customers in th sale of refined oil and gasoline because of the business practices o respondent as herein before set forth; further, that respondent ha no knowledge that numerous, or any, other competitors of respondent who manufacture and sell said devices and their equipment, but wh do not sell refined oil and gasoline, have lost numerous, or any customers or prospective customers for the purchase of their de vices or equipment because of the said business practices of the respondent as hereinbefore set forth.

II.

PARAGRAPH ONE. Comes now the respondent, Sinclair Refining Company, and for answer to the second count of the complaint of th honorable the Federal Trade Commission filed herein, denies each and every allegation thereof except such as are hereinafter admitted.

PARAGRAPH TWO. Answer paragraph one of count two of said complaint, respondent admits that it is a corporation organized existing, and doing business under and by virtue of the laws of the State of Maine with its principal business office located at the city o Chicago, in the State of Illinois, and is and has been engaged in the business of purchasing and selling refined oil and gasoline, and leas ing and loaning of oil pumps, storage tanks and containers and their equipment in various States of the United States, (but not in th

District of Columbia) in competition with numerous other persons, firms, corporations, and copartnerships similarly engaged, but alleges that prior to the 25th day of January, 1917, the corporate name of respondent was the Cudahy Refining Company.

PARAGRAPH THREE. Answering paragraph two of count two of said complaint, respondent admits the allegations thereof with the exception of the allegation that it has been engaged in the business mentioned for a period of the past four years, and alleges the fact to be that its business existence began on the 25th day of January, 1917, as alleged in paragraph two of this answer.

PARAGRAPH FOUR. (a) Answering paragraph three of count two of the complaint filed herein, respondent states that for the period of its business existence as hereinabove set forth, it has leased and made contracts for leasing, and is now leasing and makes contracts for the leasing of said devices and their equipment to be used within the several States of the United States in which respondent is authorized to transact business, which contracts provide in substance that the same shall be used for the sole purpose of storing and handling the gasoline supplied by respondent, as more fully alleged in paragraph four of the answer to count one of this complaint, in which paragraph respondent set out a copy of its "Equipment Contract," which contract is again referred to and made part of the answer to count two of this complaint.

(b) Further answering, respondent denies that the prices charged the users of such devices and equipment are fixed on the condition, agreement, or understanding that such lessees or users shall not purchase or deal in the product of a competitor or competitors of respondent; and further denies that the prices charged for such devices and equipment have any relation to, or bearing upon any restrictions as to the use to which such devices and equipment are to be put, but alleges the fact to be that the reason for restricting the use of said devices and equipment to the products supplied by respondent is to enable the public to know the kind and quality of gasoline they are purchasing, as such devices and equipment have signs or other marks or lettering thereon showing the brand of gasoline distributed through such devices and equipment.

(c) Further answering, respondent denies that it has, or has had, any agreement or understanding that the persons using the devices and equipment so supplied by respondent shall not purchase or deal in the products of a competitor or competitors of respondent, but alleges the facts to be that so far as any agreement the respondent may have with such users of said devices and equipment said users are at liberty to deal in any of the products of any competitor or competitors of respondent.

(d) Further answering, respondent denies that the effect of its contracts for the use of devices and equipment substantially lessens competition or tends to create a monopoly in the territory or locality where said contracts are operative.

Grounds of defense.

PARAGRAPH ONE. Respondent having fully answered the complaint filed herein, as grounds of defense and justification for the customs, usages, and practices as above stated, respect-
21 fully shows to this honorable commission that for many years past, and long prior to the business existence of respondent, the practice of leasing or loaning devices and equipment for less than a reasonable return upon the investment in such devices and equipment, when considered as a separate and distinct transaction, and restricting such devices and equipment to the use of the products of the concern supplying the same was followed by a large number of concerns engaged in the marketing of gasoline and kerosene, and that respondent in order to successfully compete in the marketing of its products found it necessary to lease and loan devices and equipment for the distribution of its gasoline and kerosene upon like terms and conditions as those employed by its competitors: and that this respondent did not inaugurate the practice complained of, nor by such practice introduce a new competitive factor in the marketing of such products.

PARAGRAPH TWO. Respondent further states that it refines in large quantities the products marketed by it, and expends great care and skill, and employes expensive processes and methods to the end that its products shall be of a uniform superior quality peculiarly adapted to the demands of the consuming public, and that because of the quality of its products, the business and sales policy adopted by the respondent in the marketing of same, and the extensive advertising of its products, it has built up a large trade therein and demand therefor by the consuming public, and that such consumers who favor the products of respondent are justly entitled to be protected by any safeguards that can be properly used in the marketing thereof which will assure them of getting the particular quality of brand of products they desire: and likewise respondent is entitled to such protection as can be afforded against the sale of similar products under representations, either express or implied, and that they are the products manufactured by respondent, and respondent has taken such steps as are afforded by law, and legitimate business practices, by means of trade-marks, trade names, trade brands and other devices and precautions, to the end that the consuming public may purchase respondent's products if it so desires: but respondent states that the character of gasoline and kerosene is such that there is no means of marking or identifying it when sold in bulk, except by distributing it through devices and equipment so marked as to show the
22 brand of the product being distributed and that the primary and only reason for restricting such devices and equipment to the use of respondent's products is for the protection of the consuming public in the purchase and the protection of respondent in the marketing of its products.

PARAGRAPH THREE. Respondent respectfully suggests, in the event this honorable commission shall promulgate an order directing respondent to cease and desist from any practices found by the commission to be unfair, that there should be embodied in such order provisions and directions by which respondent will be given reasonable opportunity to adjust and amend, or substitute new contracts for, respondent's existing equipment contracts, to the end that respondent and users of its devices and equipment shall not sustain financial and business losses in the readjustment of their business relations with reference to such devices and equipment, and to the end that respondent may maintain the good will and business cooperation of such users in the future marketing of respondent's products, and that proper and unobjectionable methods of business dealings of respondent with such users, and the public generally, may be disturbed and disorganized to the smallest possible extent.

Wherefore, having fully answered, respondent prays that it may go hence and have such relief as it may be entitled to in the premises.

(Signed) EDW. H. CHANDLER,
Tulsa, Oklahoma,
(Signed) ROY T. OSBORN,
111 West Washington Street, Chicago, Illinois,
(Signed) W. RAY ALLEN,
111 West Washington Street, Chicago, Illinois,
Attorneys for the Respondent, Sinclair Refining Company.

TO THE SECRETARY,
Federal Trade Commission.

Please direct all communications to Roy T. Osborn, counsel, Sinclair Refining Company, 111 W. Washington Street, Chicago, Illinois.

23 EXHIBIT C.

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 14th day of October, A. D. 1919.

FEDERAL TRADE COMMISSION.
vs.
SINCLAIR REFINING COMPANY. } Docket No. 334.

Report, findings, and conclusions.

A complaint having been issued by the Federal Trade Commission in the above-entitled proceeding and the respondent therein named having filed its answer herein, and the attorneys for the respective parties in said cause having stipulated to submit, and having sub-

mitted to the commission, subject to its approval, an agreed statement of facts in said cause which agreed statement was agreed should be taken in lieu of testimony as to those facts stipulated, and having been agreed that as to other facts the evidence to be taken in a formal hearing was to become the evidence as to such other facts as were charged in the complaint herein or made a defense in the answer, and the commission having duly appointed a time and place for the taking of testimony, and the respondent having appeared by counsel at the time and place so designated, and the commission having duly heard evidence on behalf of the commission and respondent, and the respondent having filed a brief by its attorney, and the commission having given due consideration to the complaint and answer herein and the stipulation as to the facts and the evidence submitted by the commission and by the respondent and being fully advised in the premises, reports and finds as follows:

1. That the respondent is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maine, with its principal business office located at the city of Chicago, in the State of Illinois, and is now and has been engaged in the business of purchasing and selling refined oil and gasoline, hereinafter
24 referred to as products, and is largely engaged in refining crude petroleum, and that it is now and has been since January 25, 1917, in connection with the aforementioned business, engaged in the leasing and loaning, but not in the manufacture, of oil pumps, storage tanks, and containers and their equipment, hereinafter referred to as devices, in various States of the United States, but not in the District of Columbia, in competition with numerous other persons, firms, corporations, and copartnerships similarly engaged; that prior to the 25th day of January, 1917, the corporate name of respondent was the Cudahy Refining Company.

2. That the respondent, in the conduct of its business, as aforesaid, and as hereinafter more particularly described, extensively refines petroleum and its products and purchases refined oil and gasoline, all hereinafter referred to as "products," and also purchases oil pumps, storage tanks or containers, hereinafter referred to as "devices," the said devices being used to contain said products, the said products and devices then being handled and stored in the various States of the United States and being transported in interstate commerce; that the aforesaid products are sold and the aforesaid devices are leased or loaned by respondent to various persons, firms, corporations, and copartnerships; that in the conduct of its business of purchasing and selling such products and selling, leasing or loaning such devices, the same are constantly moved from one State to another by respondent and there is conducted by respondent a constant current of trade in such products and devices between various States of the United States; that there are numerous competitors of respondent, who, in the conduct of their business in competition with respondent, purchase similar products and purchase and manufacture similar devices, the said devices being used to contain said products, the said products

and devices then being handled and stored in the various States of the United States and transported in interstate commerce; that the aforesaid products are sold and the aforesaid devices sold, leased, or loaned by such competitors of respondent to various persons, firms, corporations, and copartnerships, that in the conduct of their business, as aforesaid, competitors of respondent constantly move such products and devices from one State to another and there is conducted by said competitors a constant current of trade in such products and devices between the various States of the United States; that respondent has conducted its said businesses in a similar manner to that above described since January 25, 1917.

3. That respondent now leases and loans and has for the period of its business existence leased and loaned devices and equipment for storing and handling its products, and that the monetary considerations received by respondent do not represent reasonable returns upon the investment in such devices and equipment; and also that such leases and loans of said devices and equipment are made for monetary considerations below the cost of purchasing and vending the same when the business of leasing or loaning said devices and equipment and the returns received thereon are considered separate and apart from the general business and sales policy of the respondent; that respondent's form of contract with the users of such devices and equipment provides in substance that the devices and equipment shall be used for the sole purpose of storing and handling gasoline supplied by respondent, and that the uniform contract used by respondent for leasing such devices and equipment is in form, tenor, and substance as follows:

"Sinclair Refining Company.

"Equipment Contract.

"This Agreement, Made and entered into this_____day of _____, 19__, between Sinclair Refining Company of_____ party of the first part, and_____of the city of_____ State of_____, party of the second part, witnesseth:

"Whereas, party of the second part is now being supplied with gasoline by the party of the first part and desires to install on his premises situated at_____ the following equipment for the better storing and handling of such gasoline: _____

"Now, therefore, in consideration of the premises and of the sum of one dollar by the party of the second part to the party of the first part (the receipt of which is hereby acknowledged), the above named parties do hereby agree as follows:

"1. The above described equipment shall be used by party of the second part for the sole purpose of storing and handling the gasoline supplied by party of the first part.

"2. The party of the second part agrees, at his own cost, to maintain said equipment in good condition and repair so long as he shall continue to use same.

"3. The party of the second part agrees that he will not encumber or remove said equipment, or do or suffer to be done anything whereby said equipment or any part thereof may be seized, taken on execution, attached, destroyed or injured, or by which the title of the party of the first part thereto may in any way be altered, destroyed or prejudiced.

"4. In the event party of the second part should at any time use said equipment for any other purpose than the storing and handling of gasoline supplied by the party of the first part, or should cease for_____days to handle gasoline secured from the party of the first part the right or license of the party of the second part to said equipment shall at once terminate, and thereupon party of the first part shall have the right to enter upon said premises and remove said equipment and every part thereof.

"5. The party of the second part shall indemnify and save harmless the party of the first part to and from any liability for loss, damage, injury or other casualty to persons or property caused or occasioned by any leakage, fire or explosion of gasoline stored in said tank or drawn through said pump.

"6. This agreement shall terminate forthwith upon the sale or other disposition of said premises by party of the second part, and in any event upon the expiration of_____months from the date hereof; and in the event that by mutual consent said equipment remains in the possession of party of the second part at the expiration of said period, it is agreed that the same shall be used by party of the second part subject to all of the terms and conditions of this Agreement, and such may be terminated at any time after the expiration of_____months from the date hereof by the party of the first part giving ten days' notice to that effect. Upon the termination of this license by whatever means effected, the party of the first part shall have the right to enter upon said premises and remove the said equipment and each and every part thereof; provided, however, that the party of the second part shall have the right and option at such time to purchase said equipment by paying therefore the sum of_____.

27 "This contract is executed in triplicate, and it is agreed that the contract held by the party of the first part is to be considered the original and to be the binding agreement in case the duplicate varies from it in any particular.

"In witness thereof, the parties hereto have caused this agreement to be executed the day and year first above written.

"SINCLAIR REFINING COMPANY,

"By _____

"*Party of First Part.*

" _____

"*Party of Second Part.*

" _____"

4. That the contracts mentioned in the preceding paragraph also provide that such equipments shall be used by the lessee only for

the purpose of holding and storing the respondent's petroleum products; that a small proportion of such lessees handle similar products of respondent's competitors; and that only a small proportion of such lessees as handle similar products of respondent's competitors require or use more than a single pump outfit in the conduct of their said business; that the practice of leasing such devices requires a large capital investment; that many competitors of respondent do not possess sufficient capital and are not able to purchase and lease devices as repondent does as aforesaid, partly by reason of which such competitors have lost numerous customers to respondent; that the effect of the practice of leasing by contract such equipments, where such contracts contain the said provision restricting the use of the same to the storage and handling of respondent's products as aforesaid, may be to substantially lessen competition and tend to create for the respondent a monopoly in the business of selling petroleum products.

Conclusions.

That the the methods of competition and the business practices set forth in the foregoing findings as to the facts are, under the circumstances set forth herein, unfair methods of competition, in interstate commerce, in violation of the provisions of section 5 of an act of Congress, approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and are violation of section 3 of an act of Congress, approved October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes."

[SEAL.] (Signed) VICTOR MURDOCK,
Acting Chairman.
HUSTON THOMPSON,
WILLIAM B. COLVER,
Commissioners.

Dated this 14th day of October, A. D. 1919.

UNITED STATES OF AMERICA
Before Federal Trade Commission, ss.

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 14th day of October, A. D., 1919.

FEDERAL TRADE COMMISSION
vs.
SINCLAIR REFINING COMPANY. } Docket No. 334.

Order to cease and desist.

A complaint having been issued by the Federal Trade Commission in the above-entitled proceeding and the respondent therein named having filed its answer herein, and the attorneys for the

respective parties in said cause having stipulated to submit, and having submitted to the commission, subject to its approval, an agreed statement of facts in said cause which agreed statement was agreed should be taken in lieu of testimony as to those facts stipulated, and it having been agreed that as to other facts the evidence to be taken in a formal hearing was to become the evidence as to such other facts as were charged in the complaint herein or made a defense in the answer, and the commission having duly appointed a time and place for the taking of testimony, and the respondent having appeared by counsel at the time and place so designated, and the commission having duly heard evidence on behalf of the commission and respondent, and the respondent having filed a brief by its attorney, and the commission having given due consideration to the complaint and answer herein and the stipulation as to the facts and the evidence submitted by the commission
29 and by the respondent and being fully advised in the premises reports and finds as follows: That having made its report and findings as elsewhere set forth, and having concluded upon such report and findings that the respondent has been guilty of unfair methods of competition in interstate commerce in violation of section 5 of an act of Congress, approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and that the respondent has violated section 3 of an act of Congress, approved October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," which report, findings and conclusions are hereby referred to and made a part hereof:

Now, therefore, it is ordered, that respondent, Sinclair Refining Company, shall cease and desist from:

1. Directly or indirectly leasing pumps or tanks or both and their equipments for storing and handling petroleum products in the furtherance of its petroleum business, at a rental which will not yeild to it a reasonable profit on the cost of the same after making due allowance for depreciation and other items usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom, and from doing any matter or thing which would have the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made.

2. Entering into contracts or agreements with dealers of its petroleum products or from continuing to operate under any contract or agreement already entered into whereby such dealers agree or have an understanding that as a consideration for the leasing to them of such pumps and tanks and their equipments the same shall be used only for storing or handling the products of respondent, and from doing anything having the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made.

ovided, however, that as to such pumps and tanks and equip-
ts as are now leased by respondent contrary to the orders con-
d in paragraphs 1 and 2 herein, respondent shall have four
ths from the date hereof to enter into new contracts or agree-
ts with respect to the same which shall not be incompatible with
the spirit and intent of this order.

It is also ordered, under and by virtue of the authority con-
ferred on the commission by paragraph B of section 6 of
act to create a Federal Trade Commission, to define its powers
duties, and for other purposes," approved September 26, 1914,
the said Sinclair Refining Company, respondent, shall within
lays after the expiration of the time allowed within which re-
ndent shall have fully complied with the order to cease and
st, hereinabove set forth, report in writing to the Federal Trade
mission, fully setting forth the nature of the changes made in
conduct of its business with respect to the subject matter in-
ed in the order to cease and desist, and shall be set forth in
report in complete detail the plan or plans adopted for the
, loan, gift, or sale of any oil tanks and pumps for use in storing
ed oil or gasoline, which plan or plans are in use or are pro-
d to be put in use, and also attach to such report any contracts
by respondent in the conduct of such business.

Done at Washington, D. C., this 14th day of October, A. D. 1919.
y the Commission.

SEAL.]

(Signed) J. P. YODER,
Secretary.

Indorsed as follows:) United States of America. Before Fed-
Trade Commission. Docket No. 334. Federal Trade Commis-
vs. Sinclair Refining Company, respondent. Order to cease
desist. Entered by the Commission at its office in the city of
shington, D. C., on the 14th day of October, 1919.

EXHIBIT D.

ITED STATES OF AMERICA.
Before Federal Trade Commission:

DERAL TRADE COMMISSION
vs.
CLAIR REFINING COMPANY. } Docket No. 334.

tion for rehearing and review and to set aside order to cease and desist.

Comes now the respondent, Sinclair Refining Company, a Maine
poration, and for the following reasons and on the following
unds respectfully moves the honorable the Federal Trade Com-
sion as follows:

A. For a rehearing of said cause.
B. For a review of the order to cease and desist.
C. That the order to cease and desist be set aside.
And in support thereof respectfully shows:

Statement.

July 18, A. D. 1919, the commission caused a complaint to be issued against the respondent alleging in substance that the respondent's method and practice of leasing and loaning oil pumps and storage tanks or containers was in violation of section 5 of an act of Congress approved September 26, 1914, and section 3 of an act of Congress approved October 15, 1914. Within the time prescribed by the commission the respondent filed its answer to said complaint denying generally and specifically the allegations of the complaint charging violation of the sections of the statutes referred to. The case was heard by the commission in the city of Washington, D. C., on September 26, 27 and 29, 1919. Thereafter and on October 14, 1919, the commission issued an order to cease and desist directed to respondent wherein the commission made certain findings and conclusions, on which said order was based.

Respondent's reasons and grounds in support of motion.

1. The findings, conclusions and order of the commission are
32 (a) Not supported by the evidence.
(b) Contrary to the evidence.
(c) Contrary to law.

2. There is insufficient evidence to support the finding, and the commission erred in finding, that in the handling of oil pumps and storage tanks or containers, there is conducted by respondent a constant current of trade between various States of the United States and a transportation by respondent of said devices in interstate commerce.

3. It is immaterial to the issues of this cause, and it was error for the commission to find, that respondent leases and loans and has leased and loaned devices and equipment for storing and handling its products at and for monetary considerations below the cost of purchasing and vending the same, when the business of leasing or loaning said devices and equipment and the returns received thereon are considered separate and apart from the general business and sales policy of the respondent.

4. It is immaterial to the issues of this cause, and it was error for the commission to find:

(a) That respondent's form of contract set forth in said order provides that respondent's pumps, tanks, or containers, and other equipment shall be used by the lessee only for the purpose of holding and storing respondent's petroleum products.

(b) That a small proportion of respondent's lessees handle similar products of respondent's competitors.

(c) That only a small proportion of such lessees as handle similar oducts of respondent's competitors require or use more than a gle pump outfit in the conduct of their business.

(d) That the practice of leasing said devices requires a large pital investment.

(e) That many competitors of respondent do not possess sufficient pital and are not able to purchase or lease devices as respondent e, partly by reason of which such competitors have lost numerous stomers to respondent.

. There is insufficient evidence to support the finding, and the mmission erred in finding, that the effect of the practice of leasing contract such equipment where such contract contains a provision stricting the use of the same to the storage and handling of re- ndent's products, may be to substantially lessen competition and d to create for the respondent a monopoly in the business of selling petroleum products.

6. There is insufficient evidence to support the commission's findings and conclusion that the methods of competition and business practices set forth in the commission's findings as to the ts are unfair methods of competition in interstate commerce; and e commission erred in finding that the same are unlawful.

. The commission erred generally in making and issuing herein rder to cease and desist directed to the respondent; and it erred ecifically in ordering respondent:

(a) To discontinue leasing pump or tanks, or both, and their ipment for storing and handling petroleum products in the fur- rance of respondent's petroleum business at a nominal rental; at a rental that does not yield a monetary profit, when considered arate and apart from the general business and sales policy of ondent.

(b) To not enter into contracts or agreements, and to discontinue erating under any contract or agreement already entered into, reby the lessees agree or have an understanding that the pumps tanks and their equipment shall be used only for storing and lling of products of respondent.

. The commission is without jurisdiction over the subject matter said complaint and order.

. The order of the commission is contrary to law, is inequitable unjust:

(a) The commission is without jurisdiction to make said order.

(b) Said order is not uniform in its application or effect, and s a preference for those against whom an order has not been e and for those over whom the commission has not sought to ise its jurisdiction.

(c) The order of the commission tends to restrain and restrict e, restrict competition, and produce a monopoly.

(d) The order of the commission is against public interest.

. The commission erred in issuing and promulgating its order in against respondent until it had heard and determined all the ss of like character pending before the commission.

Respondent therefore respectfully moves the commission that it be granted a rehearing in this cause; that the commis-
34 sion review said cause and it is ordered herein; and that the commission set aside its said order to cease and desist.

Respondent also prays that it may be given opportunity to be heard on this motion, either orally, or by written brief, or both; and that in the interim said order to cease and desist, and the operation and effect thereof, be suspended.

Dated at Chicago, Illinois, this 11th day of February, 1920.

(Signed) EDW. H. CHANDLER,
Tulsa, Oklahoma,

(Signed) ROY T. OSBORN,
111 West Washington Street, Chicago, Illinois,

(Signed) W. W. RAY ELLEN,
111 West Washington Street, Chicago, Illinois,

Attorneys for the Respondent, Sinclair Refining Company.

TO THE SECRETARY,
Federal Trade Commission:

Please direct all communications to Roy T. Osborn, Counsel, Sinclair Refining Company, 111 West Washington Street, Chicago, Illinois.

EXHIBIT E.

UNITED STATES OF AMERICA,
Before Federal Trade Commission:

FEDERAL TRADE COMMISSION
vs.
SINCLAIR REFINING COMPANY. } Docket No. 334.

Motion to suspend order to cease and desist.

Comes now the respondent, Sinclair Refining Company, a Maine corporation, and for the following reasons and on the following grounds respectfully moves the honorable the Federal Trade Commission for an order suspending the commission's order to cease and desist, heretofore made and entered herein:

1. The respondent has filed herein motion praying that the
35 commission grant a rehearing in this proceeding and upon such rehearing review and set aside its said order to cease and desist. Respondent respectfully submits that pending the hearing and consideration of such motion the operation of said order should be suspended by the commission.

2. The contracts of the respondent, which were the subject of the complaint herein, are approximately five hundred (500) in number and are distributed over approximately sixteen (16) different States. In operating under said contracts the respondent encounters numerous competitors, some of which are without the jurisdiction of the

mmission, and others against which the commission has made no
der to cease and desist.

3. The order to cease and desist was made and entered October 14,
19. Respondent in good faith prepared a form of contract which
regarded as being in strict compliance with said order to cease
d desist, and which it proposed to substitute for those contracts
hich were the subject of the commission's complaint. Though not
quired so to do, respondent on November 21, 1919, formally sub-
tted to the commission respondent's said new form of contract and
quested an opinion from the commission approving the form so
mitted. The commission thereupon took the same under advise-
ent.

4. Said order to cease and desist allowed respondent four (4)
nths from the date thereof to enter into new contracts or agree-
nts in compliance therewith and respondent proceeded in good
th to secure the cancellation of existing contracts with those hold-
g its pumps and equipment and to substitute therefor contracts
on the form submitted to the commission upon a rental basis repre-
nting a reasonable profit upon the fair value of such equipment
upon the cost of the installation thereof, and respondent has suc-
eded in securing the cancellation of a number of such original con-
cts and the execution of new contracts on the form submitted to
commission and on the rental basis hereinabove specified.

5. Respondent is in receipt of a communication from the Honor-
e Claude R. Porter, chief counsel for the commission, dated Janu-
17, 1920, advising that in the judgment of the commission the
ntract as submitted is not free from objections, and is open to some
the same objections as were recently determined by the commis-
sion to apply to the contracts heretofore used by the respond-
ent, but such communication does not specify wherein the
form of contract submitted is not in accordance with the re-
rements of the said order.

6. The commission having indicated that respondent's submitted
ntract is objectionable, and respondent having presented to the
mmission a motion for a rehearing and review of the above-entitled
se, respondent respectfully represents that the commission should
spend its order to cease and desist pending a consideration of such
tion to review.

7. Upon information and belief respondent states as follows:

A. Complaints were issued by the commission against many of
spondent's competitors on or about the date complaint was issued
inst respondent, to wit, July 18, 1919.

B. In many of these causes no order to cease and desist has been
ed, although such order has issued against respondent.

C. Regardless of the order so issued, and notwithstanding the com-
nts filed against them, some of the respondent's competitors,
inst which no order has yet issued, continue to engage in the busi-
s of leasing and loaning equipment in manner and form com-
ned of by the commission.

8. The conditions set forth in subdivision 7 hereof place respondent on an inequality with its competitors and deprive it of commercial opportunities and privileges enjoyed by them, both as to old and new business. It is insisted this situation should not obtain.

Dated at Chicago, Illinois, this 11th day of February, 1920.

(Signed) EDW. H. CHANDLER,
Tulsa, Oklahoma,
(Signed) ROY T. OSBORN,
111 West Washington Street, Chicago, Illinois,
(Signed) W. RAY ALLEN,
111 West Washington Street, Chicago, Illinois,
Attorneys for the Respondent, Sinclair Refining Company.

TO THE SECRETARY,
Federal Trade Commission:

Please direct all communications to Roy T. Osborn, counsel, Sinclair Refining Company, 111 West Washington Street, Chicago, Illinois.

37 EXHIBIT F.

UNITED STATES OF AMERICA,
Before Federal Trade Commission:

FEDERAL TRADE COMMISSION
vs.
SINCLAIR REFINING COMPANY. } Docket No. 334.

Application for extension of time to comply with order to cease and desist.

Comes now the respondent, Sinclair Refining Company, a Maine corporation, and for the following reasons and on the following grounds respectfully moves the honorable the Federal Trade Commission as follows:

1. October 14, 1919, the commission made an order in the above entitled cause directing respondent to cease and desist. As to pumps and tanks and equipment as were then leased by respondent contrary to the findings and order of the commission, the respondent was granted four months from the date of said order to enter into new contracts or agreements with respect to the same, and within two days after the expiration of said four months period respondent was by said order required to report in writing to the commission fully setting forth the nature of the changes made in the conduct of its business with respect to the subject matter involved in said order.

2. It is a matter of evidence in this cause that respondent's contracts, which were the subject of the complaint herein, are approximately five hundred (500) in number and are distributed over approximately sixteen (16) different States.

3. It has proven a physical impossibility for respondent to comply fully and completely with the order of the commission in respect to all of respondent's said contracts, although it has done so with a large percentage thereof.

4. Respondent has filed herein a motion for an order of the commission suspending the commission's said order to cease and desist.

5. Respondent has filed herein a motion praying that the commission grant a rehearing in this proceeding and upon such rehearing that it review and set aside its said order to cease and desist.

Respondent therefore respectfully moves the commission that it be relieved from making and filing the report required by said order within said twenty-day period immediately succeeding the four months extending from and after October 14, 1919, pending action by the commission on respondent's said motions referred to in subdivisions No. 4 and 5 hereof.

Dated at Chicago, Illinois, this 2nd day of March, 1920.

(Signed) EDW. H. CHANDLER,
Tulsa, Oklahoma,

(Signed) ROY T. OSBORN,
111 West Washington Street, Chicago, Illinois,

(Signed) W. RAY ALLEN,
111 West Washington Street, Chicago, Illinois,
Attorneys for the Respondent,
Sinclair Refining Company.

THE SECRETARY,
Federal Trade Commission:

Please direct all communications to Roy T. Osborn, counsel, Sinclair Refining Company, 111 West Washington St., Chicago Illinois.

EXHIBIT G.

FEDERAL TRADE COMMISSION,
OFFICE OF THE CHIEF COUNSEL,
Washington, March 24, 1920.

ROY T. OSBORN, Esq.,
Counsel, Sinclair Refining Company,
111 West Washington Street, Chicago, Illinois.

DEAR SIR: I desire to inform you that the commission has denied your motion for rehearing and review and to set aside the order to cease and desist, heretofore entered in Docket 334, and also denied your motion to suspend the order to cease and desist in the same case.

The commission has extended the time of compliance with its order for a period of sixty days beyond the time originally fixed in said order.

Respectfully,

(Signed) CLAUDE R. PORTER,
Chief Counsel.

(Endorsed:) No. 2838. In the U. S. Circuit Court of Appeals for the 7th Circuit. Sinclair Refining Company, a corporation, petitioner, vs. Federal Trade Commission, respondent. Petition to review order of Federal Trade Commission. Filed May 3, 1920. Edward M. Holloway, clerk. Address communications to: Roy T. Osborn, counsel, Sinclair Refining Company, 111 W. Washington Street, Chicago, Illinois.

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

FEDERAL TRADE COMMISSION
vs.
SINCLAIR REFINING COMPANY. } Docket No. 334.

Certificate.

I, J. P. Yoder, secretary of the Federal Trade Commission, certify that the following is a full, true, and correct transcript of the record in the above-entitled proceeding, including the pleadings, testimony, exhibits, stipulation, the commission's report, findings as to the facts and conclusions, and orders therein; that this transcript is transmitted to the United States Circuit Court of Appeals for the Seventh Circuit pursuant to service upon the commission of a copy of a petition for review by Roy T. Osborn, attorney for the above-named respondent, on the 6th day of May, A. D. 1920.

[SEAL.] J. P. YODER, *Secretary.*

(Endorsed:) Filed Aug. 30, 1920, Edward M. Holloway, clerk.

40 UNITED STATES OF AMERICA,
Before Federal Trade Commission:

FEDERAL TRADE COMMISSION
vs.
SINCLAIR REFINING COMPANY, RESPONDENT. } Docket No. 334.

Transcript of the proceedings before the Federal Trade Commission—certified to the United States Circuit Court of Appeals for the Seventh Circuit, in accordance with the provisions of section 5 of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and of section 11 of the act of Congress approved October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes"—as a result of the petition filed in said court on May 3, 1920, by the attorneys for the Sinclair Refining Company, for a review of order to cease and desist entered by the Federal Trade Commission against said Sinclair Refining Company under date of October 8, 1919.

Federal Trade Commission. Docket No. 334. Section I. Copy of resolution authorizing original complaint, dated July 18th, 1919. Copy of original complaint, dated July 18th, 1919.

41 *Resolution authorizing original complaint.*

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 18th day of July, A. D. 1919.

Present: John Franklin Fort (chairman), Victor Murdock, Huston Thompson, William B. Colver, commissioners.

FEDERAL TRADE COMMISSION
vs.
SINCLAIR REFINING COMPANY.
} Docket No. 334.

Complaint in the matter of the alleged violation of section 5 of an act of Congress approved September 26, 1914, and of the alleged violation of section 3 of the act of Congress approved October 15, 1914.

Whereas the Federal Trade Commission has reason to believe that the Sinclair Refining Company has violated and is violating the provisions of section 5 of the Federal Trade Commission act, and of section 3 of an act of Congress approved October 15, 1914: Therefore be it

Resolved, That the Federal Trade Commission issue and serve upon the said Sinclair Refining Company its complaint, stating its charges in that respect in substantially the form hereunto annexed; and be it

Further Resolved, That notice be given to the said Sinclair Refining Company, as required by law, that the charges of said complaint will be heard by the commission at its office in the city of Washington, D. C., on the 15th day of September, 1919, at 10.30 o'clock in the forenoon of the said day, or as soon thereafter as the same may be reached.

Adopted by the commission.

[SEAL.] J. P. YODER, *Secretary.*

42 UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 18th day of July, A. D. 1919.

Present: John Franklin Fort (chairman), Victor Murdock, Huston Thompson, William B. Colver, commissioners.

FEDERAL TRADE COMMISSION
vs.
SINCLAIR REFINING COMPANY.
} Docket No. 334.

Complaint in the matter of the alleged violation of section 5 of the act of Congress approved September 26, 1914, and section 3 of the act of Congress approved October 15, 1914.

I.

The Federal Trade Commission, having reason to believe from a preliminary investigation made by it that the Sinclair Refining Company, hereinafter referred to as the respondent, has been using unfair methods of competition in interstate commerce in violation of the provisions of section 5 of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint, stating its charges in that respect on information and belief as follows:

PARAGRAPH ONE. That the respondent, Sinclair Refining Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maine, with its principal office and place of business located at the city of Chicago, in the State of Illinois; that for more than four years last past respondent has
43 been engaged in the business of purchasing and selling refined oil and gasoline and the leasing and loaning of oil pumps, storage tanks or containers and their equipments, in various States of the United States and the District of Columbia in competition with numerous persons, firms, corporations, and copartnerships similarly engaged.

PARAGRAPH TWO. That the respondent, in the conduct of its business, as aforesaid, and as hereinafter more particularly described, purchases refined oil and gasoline, hereinafter referred to as "products," and also purchases oil pumps, storage tanks or containers, hereinafter referred to as "devices," the said devices being used to contain said products, the said products and devices then being handled and stored in the various States of the United States and transported in interstate commerce; that the aforesaid products are sold and the aforesaid devices are leased or loaned by respondent to various persons, firms, corporations, and copartnerships; that in the conduct of its business of purchasing and selling such products and selling, leasing, or loaning such devices, the same are constantly moved from one State to another by respondent and there is conducted by respondent a constant current of trade in such products and devices between various States of the United States; that there are numerous competitors of respondent who, in the conduct of their business in competition with respondent, purchase similar products and purchase and manufacture similar devices, the said devices being used to contain said

roducts, the said products and devices then being handled and stored n the various States of the United States and transported in inter- tate commerce; that the aforesaid products are sold and the afore- aid devices sold, leased, or loaned by such competitors of respondent o various persons, firms, corporations and copartnerships; that in the onduct of their business, as aforesaid, competitors of respondent con- tantly move such products and devices from one State to another nd there is conducted by said competitors a constant current of trade n such products and devices between the various States of the United States; that respondent and many of its competitors have conducted heir said businesses in a similar manner to that above described hroughout the past four years.

PARAGRAPH THREE. That respondent in the conduct of its business, s aforesaid, with the effect of stifling and suppressing competition in the sale of the aforesaid products and in the sale, leasing, or loaning of the aforesaid devices and other equipments for stor- ing and handling the same, and with the effect of injuring com- petitors who sell such products and devices, has within the four years ast past sold, leased, or loaned and now sells, leases, or loans the said evices and their equipments for prices or considerations which do not epresent reasonable returns on the investments in such devices and heir equipments; that many such sales, leases, or loans of the afore- aid devices are made at prices below the cost of producing and vend- ng the same; that many of such contracts for the lease or loan of uch devices and their equipments provide or are entered into with he understanding that the lessee or borrower shall not place in such evices, or use in connection with such devices and their equipments, ny refined oil or gasoline of a competitor; that only a small propor- ion of the dealers in gasoline and refined oil under such agreements nd understandings deal also in similar products of respondent's ompetitors and that only a small proportion of such dealers require r use more than a single pump outfit in the conduct of their said usiness; that there are numerous competitors in the sale of such roducts, who are unable to enter into such lease agreements or under- tandings because of the large amount of investment required to arry out such lease agreements as a competitive method of selling efined oil and gasoline; that there are numerous other competitors of espondent engaged in the manufacture and sale of said devices and eir equipments who do not deal in refined oil and gasoline, and herefore do not sell or lease said devices and their equipments for a ominal consideration on a condition or understanding that their roducts only are to be used therein; that the said numerous competi- rs who were unable to enter into such lease agreements or under- andings, as aforesaid, have lost numerous customers in the sale of efined oil and gasoline to respondent because of the business prac- es of respondent hereinbefore set forth. That the said numerous her competitors of respondent who manufacture and sell said de- es and their equipments, but do not sell refined oil and gasoline, aforesaid, have lost numerous customers and prospective customers

for the purchase of their devices and equipments because of the said business practices of respondent, as hereinbefore set forth.

The Federal Trade Commission, having reason to believe from a preliminary investigation made by it that the Sinclair Refining
45 Company, hereinafter referred to as the respondent, has been using unfair methods of competition in interstate commerce, in violation of the provisions of section 3 of the act of Congress, approved October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint, stating its charges in that respect on information and belief as follows:

PARAGRAPH ONE. That the respondent, Sinclair Refining Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maine, with its principal office and place of business in the city of Chicago, in the State of Illinois; that for more than four years last past respondent has been engaged in the business of purchasing and selling refined oil and gasoline and the leasing of oil pumps and storage tanks and their equipments in various States of the United States and the District of Columbia, in competition with numerous persons, firms, corporations, and copartnerhips similarly engaged.

PARAGRAPH TWO. That the respondent in the conduct of its business, as aforesaid, and as hereinafter more particularly described, purchases refined oil and gasoline, hereinafter referred to as "products," and also purchases oil pumps, storage tanks or containers, hereinafter referred to as "devices," the said devices being used to contain said products, the said products and devices then being handled and stored in the various States of the United States and transported in interstate commerce. That such products are sold, and such devices sold, leased, or loaned by respondent to various persons, firms, corporations, and copartnerships; that in the conduct of its business of purchasing and selling such products and selling, leasing, or loaning such devices, the same are constantly moved from one State to another by respondent, and there is conducted by respondent a constant current of trade in such products and devices between the various States of the United States; that there are numerous competitors of respondent who in the conduct of their businesses in competition with respondent purchase similar products and purchase and manufacture similar devices, the said devices being used to contain said products, the said products and devices then being handled and stored in the various States of the United States and transported in interstate commerce; that such products are sold and the aforesaid devices sold, leased or loaned by such com-
46 petitors in competition with respondent to various persons, firms, corporations, and copartnerships; that in the conduct of such business, as aforesaid, respondent's competitors constantly move such products and devices from one State to another and there

conducted by said competitors of respondent a constant current of trade in such products and devices between the various States of the United States; that respondent and many of its competitors have conducted their said businesses in a similar manner to that above described throughout the four years last past.

PARAGRAPH THREE. That the respondent, for four years last past, in the conduct of its business as aforesaid, has leased and made contracts for the lease and is now leasing and making contracts for the lease of said devices and their equipments to be used within the United States, and has fixed and is now fixing the price charged therefor on the condition, agreement, or understanding that the lessees thereof shall not purchase or deal in the products of a competitor or competitors of respondent; and that the effect of such leases or contracts for lease, and conditions, agreements, or understandings, may be and is to substantially lessen competition and tend to create a monopoly in the territories and localities where such contracts are operative.

Therefore, notice is hereby given you, the said Sinclair Refining Company, that the charges of this complaint will be heard by the Federal Trade Commission at its office in the city of Washington, D. C., on the 15th day of September, A. D. 1919, at 10.30 o'clock in the forenoon of that day, or as soon thereafter as the same may be reached, at which time and place you shall have the right to appear and show cause why an order should not be entered by the Federal Trade Commission requiring you to cease and desist from the violations of law charged in this complaint.

And you will further take notice that within thirty (30) days after the service of this complaint, you are required to file with the commission an answer in conformity with Rule III of the Rules of Practice before the Commission.

In witness whereof, the Federal Trade Commission has caused this complaint to be issued, signed by its secretary, and its official seal to be affixed hereto at the city of Washington, D. C., this 18th day of July, A. D. 1919.

By the commission:

[SEAL.] (Signed) J. P. YODER,
Secretary.

(Signed) CLAUDE R. PORTER,
Chief Counsel for Commission.

47 Federal Trade Commission, Docket No. 334. Section II. Copy of Answer of Respondent filed September 2, 1919.

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

FEDERAL TRADE COMMISSION
vs.
SINCLAIR REFINING COMPANY. } Docket No. 334.

In the matter of the alleged violation of section 5 of the act of Congress approved September 26, 1914, and section 3 of act of Congress approved October 15, 1914.

Answer to the complaint.

BEFORE FEDERAL TRADE COMMISSION,
United States of America, ss:

FEDERAL TRADE COMMISSION
vs.
SINCLAIR REFINING COMPANY. } Docket No. 334.

In the matter of the alleged violation of section 5 of the act of Congress approved September 26, 1914, and section 3 of act of Congress approved October 15, 1914.

Answer to the complaint.

I.

PARAGRAPH ONE. Comes now the respondent, Sinclair Refining Company, and for answer to the first count of the complaint of the honorable the Federal Trade Commission filed herein, denies each and every allegation thereof, except such as are hereinafter admitted.

PARAGRAPH TWO. Answering paragraph one of count one of said complaint, respondent admits that it is a corporation organ-
48 ized, existing, and doing business under and by virtue of the laws of the State of Maine, with its principal business office located at the city of Chicago, in the State of Illinois, and is and has been engaged in the business of purchasing and selling refined oil and gasoline, hereinafter referred to as "products," as well as the general refining of oils and the marketing of refinery products, and further admits that it is now and has been engaged in the leasing and loaning of oil pumps, storage tanks and containers and their equipment, hereinafter referred to as "devices," in various States of the United States (but not in the District of Columbia), in competition with numerous other persons, firms, corporations, and copartnerships similarly engaged, but alleges that prior to the 25th day of January, 1917, the corporate name of respondent was the Cudahy Refining Company.

PARAGRAPH THREE. Answering paragraph two of count one of said complaint, respondent admits the allegations thereof with the exception of the allegation that it has been engaged in the business men-

tioned for a period of the past four years, and alleges the fact to be that its business existence began, under the name which respondent now bears, on the 25th day of January, 1917, as alleged in paragraph two of this answer.

PARAGRAPH FOUR. (a) Answering paragraph three of count one of said complaint, respondent admits that it does now lease and loan, and has for the period of its business existence leased and loaned, devices and equipment for storing and handling its products, and that the considerations received by respondent do not in all instances represent reasonable returns upon the investment in such devices and equipment, and also that such leases and loans of said devices and equipment are at times made at prices below the cost of purchasing and vending the same, when the business of leasing or loaning said devices and equipment and the returns received thereon are considered separate and apart from the general business and sales policy of the respondent.

(b) Further answering, respondent states that it has no knowledge of the cost to the manufacture of producing and vending said devices and equipment.

(c) Further answering, respondent denies that its practice and custom of leasing and loaning said devices and equipment as herein set forth has the effect of stifling and suppressing competition or of injuring competitors who sell the products and devices mentioned in said complaint.

(d) Further answering, respondent states that its form of contract with the users of such devices and equipment provides in substance that the same shall be used by such party for the sole purpose of storing and handling gasoline supplied by respondent, and for the information of this honorable commission the form of respondent's contract with such users, styled "Equipment Contract," reads as follows:

"Sinclair Refining Company.

"Equipment Contract.

"This agreement, made and entered into this _____ day of _____, 19__, between Sinclair Refining Company of _____, party of the first part, and _____ of the city of _____, State of _____, party of the second part, witnesseth:

"Whereas, party of the second part is now being supplied with gasoline by the party of the first part and desires to install on his premises situated at _____ the following equipment for the better storing and handling of such gasoline: _____

"Now, therefore, In consideration of the premises and of the sum of one dollar by the party of the second part to the party of the first part (the receipt of which is hereby acknowledged), the above-named parties do hereby agree as follows:

"1. The above-described equipment shall be used by party of the second part for the sole purpose of storing and handling the gasoline supplied by party of the first part.

"2. The party of the second part agrees, at his own cost, to main
tain said equipment in good condition and repair so long as he sha
continue to use same.

"3. The party of the second part agrees that he will not encumb
or remove said equipment, or do or suffer to be done anythin
whereby said equipment or any part thereof may be seized, taken o
execution, attached, destroyed, or injured, or by which the title
the party of the first part thereto may in any way be altered, d
stroyed, or prejudiced.

"4. In the event party of the second part should at any time us
said equipment for any other purpose than the storing and handlin
of gasoline supplied by the party of the first part, or should cease fo
---------- days to handle gasoline secured from the party of the firs
part the right or license of the party of the second part to said equip
ment shall at once terminate, and thereupon party of the first par
shall have the right to enter upon said premises and remove sai
equipment and every part thereof.

50 "5. The party of the second part shall indemnify and sav
harmless the party of the first part of and from any liabilit
for loss, damage, injury, or other casualty to persons or propert
caused or occasioned by any leakage, fire, or explosion of gasolin
stored in said tank or drawn through said pump.

"6. This agreement shall terminate forthwith upon the sale or othe
disposition of said premises by party of the second part, and in an
event upon the expiration of ---------- months from the date hereo
and in the event that by mutual consent said equipment remains i
the possession of party of the second part at the expiration of sai
period, it is agreed that the same shall be used by party of the secon
part subject to all of the terms and conditions of this agreement, an
such may be terminated at any time after the expiration of ----------
months from the date hereof by the party of the first part giving te
days' notice to that effect. Upon the termination of this license b
whatever means effected, the party of the first part shall have th
right to enter upon said premises and remove the said equipment an
each and every part thereof; provided, however, that the party
the second part shall have the right and option at such time to pu
chase said equipment by paying therefor the sum of ----------

"This contract is executed in triplicate, and it is agreed that th
contract held by the party of the first part is to be considered th
original and to be the binding agreement in case the duplicate vari
from it in any particular.

"In witness thereof, the parties hereto have caused this agreemen
to be executed the day and year first above written.

"SINCLAIR REFINING COMPANY.

"By ----------

"*Party of First Part.*

" ----------

"*Party of Second Part.*

" ----------"

(e) Further answering, respondent states that it does not have definite information as to what proportion of dealers in gasoline and refined oil who have been supplied with devices and equipment by respondent, as above stated, deal also in similar products of respondent's competitors, nor of the proportion of such dealers who require to use more than a single pump outfit in the conduct of their business; further, that respondent has no information as to the number of its competitors, if any, who are unable to enter into such agreements; further, that respondent has no knowledge as to whether there are numerous, or any, other competitors of respondent engaged in the manufacture of such devices and equipment who do not deal in refined oil and gasoline, and who do not sell or lease such devices and equipment for a nominal consideration on a condition or understanding that their products only are to be used therein; further, that respondent has no knowledge that numerous, or any, competitors who are unable to enter into such lease agreements or understanding have lost numerous, or any, customers in the sale of refined oil and gasoline because of the business practices of respondent as hereinbefore set forth; further, that respondent has no knowledge that numerous, or any, other competitors of respondent who manufacture and sell said devices and their equipment, but who do not sell refined oil and gasoline, have lost numerous, or any, customers or prospective customers for the purchase of their devices or equipment because of the said business practices of the respondent as hereinbefore set forth.

II.

PARAGRAPH ONE. Comes now the respondent, Sinclair Refining Company, and for answer to the second count of the complaint of the honorable, the Federal Trade Commission filed herein, denies each and every allegation thereof, except such as are hereinafter admitted.

PARAGRAPH TWO. Answering paragraph one of count two of said complaint, respondent admits that it is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maine with its principal business office located at the city of Chicago, in the State of Illinois, and is and has been engaged in the business of purchasing and selling refined oil and gasoline, and leasing and loaning of oil pumps, storage tanks and containers and their equipment in various States of the United States (but not in the District of Columbia) in competition with numerous other persons, firms, corporations, and copartnerships similarly engaged, but alleges that prior to the 25th day of January, 1917, the corporate name of respondent was the Cudahy Refining Company.

PARAGRAPH THREE. Answering paragraph two of count two of said complaint, respondent admits the allegations thereof with the exception of the allegation that it has been engaged in the business mentioned for a period of the past four years, and alleges the fact to be that its business existence began on the 25th day of January, 1917, as alleged in paragraph two of this answer.

PARAGRAPH FOUR. (a) Answering paragraph three of count t of the complaint filed herein, respondent states that for the period its business existence as hereinabove set forth, it has leased and ma contracts for the leasing, and is now leasing and makes contracts f the leasing of said devices and their equipment to be used within t several States of the United States in which respondent is authoriz to transact business, which contracts provide in substance that t same shall be used for the sole purpose of storing and handling t gasoline supplied by respondent, as more fully alleged in paragra four of the answer to count one of this complaint, in which paragra respondent set out a copy of its "Equipment Contract," which co tract is again referred to and made part of the answer to count t of this complaint.

(b) Further answering, respondent denies that the prices charg the users of such devices and equipment are fixed on the conditio agreement or understanding that such lessees or users shall not pu chase or deal in the product of a competitor or competitors of r spondent; and further denies that the prices charged for such devi and equipment have any relation to, or bearing upon any restrictio as to, the use to which such devices and equipment are to be put, b alleges the facts to be that the reason for restricting the use of su devices and equipment to the products supplied by respondent is enable the public to know the kind and quality of gasoline they a purchasing, as such devices and equipment have signs or other mar or lettering thereon showing the brand of gasoline distributed throu such devices and equipment.

(c) Further answering, respondent denies that it has, or has ha any agreement or understanding that the persons using the devi and equipment so supplied by respondent shall not purchase or de in the products of a competitor or competitors of respondent, b alleges the facts to be that so far as any agreement the respond may have with such users of said devices and equipment said us are at liberty to deal in any of the products of any competitor or co petitors of respondent.

(d) Further answering, respondent denies that the effect
53 its contracts for the use of devices and equipment substantial lessens competition or tends to create a monopoly in the ter tory or locality where said contracts are operative.

Grounds for defense.

PARAGRAPH ONE. Respondent having fully answered the complai filed herein, as grounds of defense and justification for the custom usages, and practices as above stated, respectfully shows to this ho orable commission that for many years past, and long prior to th business existence of respondent, the practice of leasing or loanin devices and equipment for less than a reasonable return upon th investment in such devices and equipment, when considered as separate and distinct transaction, and restricting such devices an

uipment to the use of the products of the concern supplying the me was followed by a large number of concerns engaged in the rketing of gasoline and kerosene, and that respondent in order successfully compete in the marketing of its products found it essary to lease and loan devices and equipment for the distribu- n of its gasoline and kerosene upon like terms and conditions as ose employed by its competitors; and that this respondent did not augurate the practice complained of, nor by such practice intro- ce a new competitive factor in the marketing of such products.

PARAGRAPH TWO. Respondent further states that it refines in large antities the products marketed by it, and expends great care and ill, and employes expensive processes and methods to the end at its products shall be of a uniform superior quality, peculiarly apted to the demands of the consuming public, and that because f the quality of its products, the business and sales policy adopted the respondent in the marketing of same, and the extensive vertising of its products, it has built up a large trade therein and mand therefor by the consuming public, and that such consum- s who favor the products of respondent are justly entitled to be otected by any safegards that can be properly used in the market- g thereof which will assure them of getting the particular quality d brand of products they desire; and likewise respondent is enti- d to such protection as can be afforded against the sale of similar oducts under representations, either express or implied, that they e the products manufactured by respondent, and respondent has taken such steps as are afforded by law, and legitimate business practices, by means of trade-marks, trade names, trade brands, and other devices and precautions, to the end that the con- ming public may purchase respondent's products if it so desires; t respondent states that the character of gasoline and kerosene is h that there is no means of marking or identifying it when sold bulk, except by distributing it through devices and equipment so rked as to show the brand of the product being distributed, and t the primary and only reason for restricting such devices and uipment to the use of respondent's products is for the protection f the consuming public in the purchase, and the protection of spondent in the marketing of its products.

PARAGRAPH THREE. Respondent respectfully suggests, in the event s honorable commission shall promulgate an order directing re- ndent to cease and desist from any practices found by the com- ssion to be unfair, that there should be embodied in such order ovisions and directions by which respondent will be given reason- le opportunity to adjust and amend, or substitute new contracts r, respondent's existing equipment contracts, to the end that re- ondent and users of its devices and equipment shall not sustain ancial and business losses in the readjustment of their business lations with reference to such devices and equipment, and to the that respondent may maintain the good will and business coop- ation of such users in the future marketing of respondent's prod-

ucts, and that proper and unobjectionable methods of business dea
ings of respondent with such users, and the public generally, ma
de disturbed and disorganized to the smallest possible extent.

Wherefore, having fully answered, respondent prays that it ma
go hence and have such relief as it may be entitled to in the premise

EDW. H. CHANDLER,
Tulsa, Oklahoma,
ROY T. OSBORN,
111 W. Washington St., Chicago, Ill.,
W. RAY ALLEN,
111 W. Washington St., Chicago, Ill.,
Attorneys for the Respondent, Sinclair Refining Company.

TO THE SECRETARY,
Federal Trade Commission:

Please direct all communications to Roy T. Osborn, Counsel, Sin
clair Refining Company, 111 W. Washington Street, Chicago
Illinois.

55 Federal Trade Commission. Docket No. 334. Section III
Copy of notice of taking of testimony dated September 1
1919.

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

FEDERAL TRADE COMMISSION
vs.
SINCLAIR REFINING COMPANY. } Docket No. 334

Notice of taking of testimony.

SIR: Please take notice that the taking of testimony in support
the complaint of the Federal Trade Commission in the above entitl
proceeding and also on behalf of respondents together with argume
by attorneys for the commission and respondent, will begin at Was
ington, D. C., in the hearing room of the Federal Trade Comm
sion Building in said city on Friday the 26th day of Septemb
1919, at ten o'clock in the forenoon of that day.

Dated September 17, 1919.

Very truly, yours,

(Signed) HUSTON THOMPSON,
Commissioner.

To Roy T. Osborn, attorney for respondent, c/o Sinclair Refini
Co., 111 West Washington Street, Chicago, Illinois.

Due service of the above notice of taking of testimony is here
acknowledged this 19th day of September, 1919.

(Signed) ROY T. OSBORN,
Attorney for Respondent.

Federal Trade Commission. Docket No. 334. Section IV. Copy of testimony taken September 26 and 27, 1919, at Washington, D. C. Copy of testimony taken September 29, 1919, at Washington, D. C.

Before the Federal Trade Commission.

FEDERAL TRADE COMMISSION,
vs.
SINCLAIR REFINING COMPANY. } Docket No. 334.

FEDERAL TRADE COMMISSION,
vs.
OKLAHOMA PRODUCING AND REFINING CORPORATION OF AMERICA. } Docket No. 310.

FEDERAL TRADE COMMISSION,
vs.
IOWA OIL COMPANY. } Docket No. 336.

FEDERAL TRADE CORPORATION,
vs.
L. SMITH OIL AND GASOLINE COMPANY. } Docket No. 314.

FEDERAL TRADE COMMISSION,
vs.
BARTLES OIL COMPANY. Docket No. 332.

FEDERAL TRADE COMMISSION,
vs.
RICHARDSON LUBRICATING CO. } Docket No. 330.

Washington, D. C., September 26–27, 1919. Hale & Allen, official reporters, Whitford Building, Washington, D. C.

Before the Federal Trade Commission.

Docket No. 334.
FEDERAL TRADE COMMISSION,
vs.
SINCLAIR REFINING COMPANY.

Docket No. 310.
FEDERAL TRADE COMMISSION,
vs.
OKLAHOMA PRODUCING AND REFINING CORPORATION OF AMERICA.

Docket No. 336.
FEDERAL TRADE COMMISSION,
vs.
IOWA OIL COMPANY.

Docket No. 314.

FEDERAL TRADE COMMISSION,

vs.

C. L. SMITH OIL AND GASOLENE COMPANY.

Docket No. 332.

FEDERAL TRADE COMMISSION,

vs.

BARTLES OIL COMPANY.

Docket No. 330.

FEDERAL TRADE COMMISSION,

vs.

RICHARDSON LUBRICATING CO.

CONFERENCE ROOM, FEDERAL TRADE COMMISSION,
Washington, D. C., Friday, September 26, 191

The above-entitled matters came on for hearing before the Fed Trade Commission at 2 o'clock p. m.

Present: Commissioners Murdock (acting chairman), Thomps and Colver.

Present, also: Mr. Chester L. Zechiel, attorney-examiner, and Joseph H. Burdeau, attorney-examiner.

Appearances: Mr. Ray T. Osborn, 111 West Washington Str Chicago, Illinois, appearing for Sinclair Refining Company. W. E. MacEwen, 1050 Rose Building, Cleveland, Ohio, appearing Nash Refining Company.

58 *Proceedings.*

Commissioner THOMPSON. We would like to know for the rec just what companies are represented here, and also what compani have been subpœnaed, and the witnesses or representatives that ha come.

Mr. ZECHIEL. The companies that have been notified that th would be a hearing today are the Oklahoma Producing and Refin Corporation of America, in docket No. 310; the Sinclair Refin Company, docket No. 334; Bartles Oil Company, docket No. 3 Iowa Oil Company, docket No. 336; C. L. Smith Oil & Gasolene Co pany, docket No. 314; and the Richardson Lubricating Compa docket No. 330.

The Richardson Lubricating Company has appeared by their torney, Mr. Lyman McCarl. Mr. McCarl and I have been togeth part of the morning and we have the agreed statement, I think, fu ironed out.

The Sinclair Company is appearing by their attorney, Mr. Osbo We have agreed on most of the facts, but the economic situation not agreed to and there has been no attempt made to stipulate.

I do not know whether any of the other companies are appearing
y counsel or not.

The C. L. Smith Company is appearing by the president, C. L.
mith. I do not know about the others.

Are the other respondents represented?

(No response.)

Commissioner COLVER. We understand that these cases are not
nsolidated except that they are being heard simultaneously; that
ch case is being considered separately and there is not in fact a
nsolidation?

Mr. ZECHIEL. That is correct, sir, as I understand it.

Commissioner THOMPSON. How about the Bartles Company? Has
ere not been some appearance?

Mr. ZECHIEL. There has been an appearance, but not for the hear-
g this morning. There was a statement by their attorney yesterday
at he wanted to enter into an agreed statement of facts. Whether
not we will do that I do not know. He did say this, that if he did
t appear today he would waive all his rights as to cross-examina-
n, and also he was willing to consent to the joining of the cases
r the purpose of hearing.

Commissioner THOMPSON. Do I understand, then, that the only thing before the commission to-day is the question of the economic situation?

Mr. ZECHIEL. And proof as to jurisdiction. The practice has not
n admitted. There has been no proof, in fact, or stipulation of
kind with respect to the Iowa Oil Company, the Oklahoma Pro-
ing & Refining Corporation of America; and the C. L. Smith
Company do not admit jurisdiction. What you state is true
the rest of the cases.

ommissioner THOMPSON. Does the commission care to introduce
evidence at this time upon any of these points?

Mr. ZECHIEL. Yes, sir; we have our witnesses here.

ommissioner COLVER. If these cases are before us we are now to
any testimony with respect to the effect of these practices, the
omic effect of these practices?

Mr. ZECHIEL. And also with respect to jurisdiction.

ommissioner COLVER. Yes; with the opportunity of those com-
es that are represented here to cross-examine or produce wit-
s on that point; and then thereafter any point in any of these
s which is not covered by stipulation is subject of further hear-
y the commission or stipulation, if that can be arrived at.

. ZECHIEL. My understanding, Mr. Colver, about that was that
se the respondents did not appear to-day they were not to have
pportunity to enter a defense on any question.

mmissioner COLVER. No; but those who are here and do not stip-
as to jurisdiction, for example, will be heard on that sep-
ely.

. ZECHIEL. That is, at the close of the commission's evidence?

mmissioner COLVER. Yes.

Mr. ZECHIEL. That is right.

Mr. MACEWEN. I have been subpœnaed representing the Na Refining Company. I do not know that there is any complai against us or what the situation is. I happen to be their secreta and counsel and I am here for whatever purpose the commissi desires.

Mr. ZECHIEL. You were subpœnaed only as a witness on beha of the Government in one of the other cases.

The ACTING CHAIRMAN. Did you enter your appearance with t reporter for the Sinclair Company, Mr. Osborn?

Mr. OSBORN. Mr. Osborn, appearing for the Sinclair Company.

The ACTING CHAIRMAN. Mr. Zechiel, I would like to kn
60 what case this is and what the stage of the case is p sonally.

Mr. ZECHIEL. In the case in which I have called Mr. Smith as witness, it is that of the Federal Trade Commission against the C Smith Oil & Gasolene Company, a corporation doing busines the State of Missouri, selling refined oil and gasolene, and it h also in the past sold and leased or loaned oil tanks and pumps contain such oil or gasolene. The charge of the commission in th case, as in all the other cases, is that the C. L. Smith Compan or the respondent, has leased or loaned or given away oil tanks a pumps to be used in connection with the distribution and sale refined oil and gasolene under contracts or with an agreement understanding that the same should be used in connection with t sale and distribution of the oil product of the respondent only in this case, the C. L. Smith Company—and that these leases loans, whichever they were, or sales, were made without a reas able remuneration or compensation for the work involved or t goods that were leased or loaned. In other words, that these lea were made of these oil tanks and pumps at a nominal considerati or at least at not a sufficient consideration to make the practice leasing and loaning, unconnected with the sale and distribution gasolene and oil, a profitable business.

We are charging this under section 5 of the Federal Trade Co mission act as an unfair method of competition. We are also cha ing the same kind of practice under section 3 of the Clayton A and alleging that it is a tying contract in violation of that act wh forbids the sale or lease of any goods, wares, or merchandise t purchaser or lessor under the condition or understanding that goods of a competitor shall not be purchased or used at the sa time, where, it is further said in section 3 such practice shall s stantially lessen competition or tend to create a monopoly.

The ACTING CHAIRMAN. When did this complaint issue?

Mr. ZECHIEL. The complaint against the C. L. Smith Compa was issued—I do not remember the exact date. It was in June July.

The ACTING CHAIRMAN. Has the respondent made answer?

Mr. ZECHIEL. The respondent has made answer, and in the re of the respondent it is in a general way denied that the Fed

Trade Commission has any jurisdiction at all; that is, the C. L. Smith Company, the respondent, has said so because they are not doing an interstate business. He admits that he is guilty of the practice of leasing pumps under the conditions which the complaint charges, but denies that the effect of such leasing and loaning of pumps is to substantially lessen competition or tend to create a monopoly or is injuring their competitors in the sale of gasolene or competitors in the sale of oil tanks and pumps.

The ACTING CHAIRMAN. Has there been a hearing before this, before an examiner?

Mr. ZECHIEL. No hearing before an examiner. This is the first hearing in this case.

Besides the C. L. Smith Company, there is the Sinclair Refining Company. There has been an attempt made this forenoon in connection with the attorney for the Sinclair Company, Mr. Osborn, to agree on the facts in the Sinclair case where there is a similar complaint and an answer filed, to cover such part of the case as involves the question of jurisdiction. No attempt has been made to cover the evidence and the facts concerning the economic effect of this sort of a practice.

So far as I know, the Bartles Oil Company will not appear, but they have agreed by their attorney that they will waive their failure to appear.

In the case of the Iowa Oil Company, I understand—but I do not think it is a matter of record—that Mr. Clifford Thorne was to appear on their behalf. They were notified to appear here to-day for hearing. I have no personal knowledge of whether they have appeared or whether they intend to appear. The same charges are lodged against the Iowa Oil Company.

In the case of the Iowa Oil Company they admit generally all matters as to jurisdicton, that they are engaged in interstate commerce; they admit also that they are generally engaged in the practice of leasing and loaning oil tanks and pumps for a nominal consideration. They deny, however, that they have a tying contract within the meaning or the purview of section 3 of the Clayton act. They deny, also, injury to competitors, and deny that they are conducting their business in violation of section 5 of the Federal Trade Commission act.

Commissioner THOMPSON. I wish to state for the record that Mr. Clifford Thorne appeared before the commission several days ago and came to an oral agreement or understanding with the commission that he would appear to-day and represent his clients before the commission and cross-examine the commission's witnesses if he saw fit, and that he would like additional time, the time being fixed as October 3, I believe, in which to produce any evidence in behalf of his clients before the commission.

Commissioner COLVER. The exact date of his appearance here was Monday of this week.

Commissioner THOMPSON. Yes.

The ACTING CHAIRMAN. Are you ready for the witness, Mr. Zechiel?

Mr. ZECHIEL. Yes, sir.

The ACTING CHAIRMAN. Do you want the witness sworn?

Mr. ZECHIEL. Yes, sir.

CHARLES L. SMITH was called as a witness by and and on behalf of the Federal Trade Commission, and being first duly sworn, testified as follows:

Direct examination:

Q. (By Mr. Zechiel.) Where is your place of business?

A. St. Louis.

Q. What are your connections with the C. L. Smith Company?

A. President.

Q. What is the name of your company?

A. C. L. Smith Oil & Gasolene Company.

Q. In a general way, where in Missouri or elsewhere do you conduct business in the retailing of gasolene and oil?

A. Gasolene is confined strictly to St. Loius. We do a little scattering business around St. Louis in lubricating oily only. The filling stations are confined entirely to St. Louis.

Q. Do you do any business at all outside of the State of Missouri?

A. No, sir.

Q. In your position of president of the company you are acquainted with your competitors in your community?

A. In a general way, yes.

Q. Who are your competitors in your territory?

A. The Standard of Indiana, the Texas Oil Company, the Pierce Oil Corporation, the Automobile & Gasolene Company and the St. Louis Oil Company—that is, as far as filling stations are concerned or the gasolene business.

Q. My question is this: All those companies which sell or
63 wholesale refined oil and gasolene in your territory in competition with you. Is that list you have given the parties?

A. There is one other that I just thought of—the Independent Oil Company, a very small concern. They operate about two filling stations there.

Q. Where are the principal places of business of these concerns, do you know?

A. You mean their different filling stations?

Q. No; I mean their offices, their headquarters.

A. The Standard of Indiana and the Pierce——

Q. The Standard of Indiana is where?

A. St. Louis, Syndicate Trust Building.

Q. Their home office?

A. That is their general western office. I think the home office of the Standard of Indiana is in Chicago. The Pierce Oil Cor-

ation's home office is in New York City. The Texas Oil Company's ne office is in New York City. The home office of the Automobile iasolene Company is in St. Louis; and the St. Louis Independent l Company are in St. Louis.

Q. Do you know whether or not these companies ship their prod- s into the State of Missouri from other States than Missouri?

A. Yes, sure they do. The Pierce ships from Oklahoma, the ndard from Wood River, Illinois; the Texas—I do not know ere their refinery is. The Automobile & Gasolene Company——

Q. Their refinery is not in the State of Missouri?

A. No, sir; none of them have refineries in the State of Missouri.

Q. What about the other companies?

A. They are all jobbers, like myself. The Automobile & Gasolene mpany of St. Louis and ourselves buy from various refineries.

Q. They all ship their gasolene and oil out of the State of Mis- ri into the State of Missouri?

A. Yes.

Q. In connection with your gasolene and oil business do you dle oil tanks and pumps—I think that is the way you commonly er to them—in connection with the use of gasolene?

A. Yes, sir.

Q. Where do you get your oil tanks and pumps?

A. I think, without exception, we get them all from the S. F. Bowser Company.

Q. Where are they located?

A. Fort Wayne, Indiana.

Q. Do you order those shipped to you?

A. Shipped to me direct.

Q. To St. Louis?

A. Yes, sir.

Q. Do you have them shipped in in carload lots?

A. No, sir.

Q. When you have them shipped in, do you have them shipped ou directly?

. Yes, sir.

. You do not have them sent to your customers?

. No, sir.

. Do you order those tanks and pumps for a particular customer?

. Yes, sir.

. And deliver to the customer immediately after it arrives?

. Yes, sir.

. You install your own pumps?

. In most cases we do; yes.

. What are the conditions under which you lease or loan these ps at the present time?

. I might say this in that connection, that as far as the C. L. h Oil & Gasolene Company is concerned we have not made it a tice, since the company has been changed and reincorporated, to

loan or lease pumps or tanks. We fell heir to about eight or ten such stations from the Gibbs-Brown Company, our predecessors.

Q. How long have you been the owner of this company?

A. Two years next April.

Q. Are you acquainted with the business of the Gibbs-Brown Company, your predecessors?

A. Yes, sir.

Q. Under what conditions did they lease or loan their pumps, or sell them?

A. They generally took a long term lease, anywhere from seven to ten years, on the frontage of a garage for a nominal sum of, say, one dollar a year. They made the installation and paid the owner of the garage a certain commission per gallon of gasolene to operate the station for them.

65 Q. After you came into ownership of the company, did you install any oil tanks or pumps?

A. No, sir.

Q. You did not install any at all, you mean?

A. No, sir.

Q. Under what conditions or how did you take over these contracts of your predecessors?

A. We simply changed the name of the company or corporation.

Q. But the contracts remained in full force and effect?

A. Oh, yes.

Q. It is a fact that at the time you took over your predecessors' corporation you did have oil tanks and pumps leased to various customers of yours who were paying only a nominal consideration for the benefits received?

A. Yes, sir.

Q. Was there any condition or understanding in the lease or loan of those pumps concerning the use of gasolene of any other competitor of yours?

A. Yes, sir. It set forth that they were to use none but our gasolene and oil and greases.

Commissioner THOMPSON. Is there any contract here?

Mr. ZECHIEL. There is no contract as an exhibit. I was just going to ask the witness if he had a contract.

Q. (By Mr. ZECHIEL.) Do you have a copy of the contract?

A. No, sir; I have not.

Q. Will you furnish a copy of the contract?

A. I will be glad to mail you one, any one at all.

Q. Does the contract provide that the companies or the customers to whom you may loan or lease these pumps and tanks are not to use any gasolene of any other competitor at all?

A. Absolutely.

Q. They do not merely provide, then, that the gasolene of a competitor shall not be used in a pump or tank which you furnish?

A. No gasolene but ours shall be handled through this equipment, under the terms of the lease.

Q. If I understood you, at first you testified that, say, a customer, hn Smith, who has one of your leased outfits, is not to deal in the solene products of any other competitor so long as he has your outfit?

A. Oh, no, just with our outfit. He can install a pump belonging to somebody else.

Q. As a matter of fact, do any of your customers who have such a se agreement with your company have more than one outfit on the emises?

A. No.

Q. None at all?

A. No, sir.

Q. Do your customers who are under these lease agreements buy d sell gasolene products of a competitor of yours?

A. I do not know of a single instance where they have done it.

Q. How long have you engaged in the gasolene business?

A. About fifteen years.

Q. I will ask you to more particularly describe your experience those fifteen years.

A. Thirteen of the fifteen years I was engaged in various capaci- s with the Pierce Oil Corporation, from accountant to general lesman. I was general salesman when I left there.

Q. (By the ACTING CHAIRMAN.) I would like to know, just for r own information, and not dealing with the legal side, only to ar up my mind on the proposition: When the automobile first ne in, you were in the gasolene business. How did an automobile its gasolene in those days, just at the beginning?

A. We had gasolene tanks installed on the premises of the owner, e delivered it to them by tank wagon.

Q. When the first garage appeared, how was the automobile sup- ed?

A. The same way, through an underground tank. The tank gons would fill it every other day or so.

Q. My recollection is that it was a galvanized-iron concern with a pump attached to it.

A. There were some tanks of that caliber, yes. We still have some them.

Q. What was the evolution from that as the automobile business gressed?

A. First there was the small filling station with the one-gallon wser pump, or some other make of pump: one turn to the gallon.

Q. That was a spindly affair, painted red, with a wheel?

A. Yes, sir.

Q. Was there a further evolution from that?

A. Yes, sir. We got the five-gallon self-measuring pump. Since t time we have got various makes of pumps and more elaborate tions, and that sort of thing, until in the last ten years the auto- bile owner has not seen fit to buy his gasolene in any other way n through a filling station. There are some that have installed

their own underground equipment, supplying two hundred to five hundred gallons, in their garages at an expense, I think, of two or three hundred dollars. But that is very rare. I venture to say that ninety per cent of the buying public patronize the filling stations today.

Q. So that has been the development of the business?

A. From the filling station that we could construct at an expense of about two or three hundred dollars, in some old tin garage, or something like that, running up to $70,000 to $80,000.

Q. (By Mr. Zechiel.) Going back again to the specific terms of your contract, for a minute: Does your contract provide, and is it understood in the contract that customers to whom you loan these pumps and tanks under the terms of the contract you referred to are not to use either gasolene or refined oil or lubricating oil except those they buy from you?

A. Absolutely.

Q. During the time you have had these contracts with these various customers, were these various oil companies whom you have enumerated earlier in your testimony actively in competition with you in the city of St. Louis?

A. With the exception of the Standard, they were: yes.

Q. You mean the Standard of what?

A. The Standard of Indiana.

Q. So that at that time, when you were operating under these contracts, if any of these other companies except the Standard of Indiana had attempted to sell gasolene, or if they did attempt to sell gasolene to your customers, they would have been unable to do so?

A. Yes.

Q. (By Commissioner Colver.) On lubricating oils?

A. Yes, sir; or lubricating oils. We depend upon lubricating oil to carry the business.

68 Q. (By Mr. Zechiel.) Going back again to your testimony concerning the use of other pumps of competing oil companies and the purchasing of gasolene from competing oil companies, do I understand you to testify that no other competing company can put in a pump or does put in a pump or tank on the premises of the garage people or other distributors of your product where you have an oil pump or tank installed under this lease and tying contract?

A. No, sir.

The Acting Chairman. I am not clear on that. I wish you would clear that up. What do you mean by that? What is your question?

(The question referred to was thereupon read by the reporter as above recorded.)

The Witness. They can only do that by the customer violating his agreement with us.

Q. (By Mr. BURDEAU.) I understood you to say, Mr. Witness, that your contracts, whatever they were, contained no restriction against opening a place next door?

A. No; he can do that.

Q. I understood you to say that you more or less regarded his garage as your premises under these nominal lease agreements?

A. Yes, sir.

Q. You never knew of a case of one of them using a competitor's products?

A. No.

Q. (By Mr. ZECHIEL.) You testified that prior to your ownership of the C. L. Smith Oil & Gasolene Company you had had some ten years' experience with the Pierce Oil Company?

A. Thirteen years.

Q. Thirteen years? Did you have any other experience with any other oil companies?

A. No, sir.

Q. During the time when you were with the Pierce Oil Company were you acquainted with the distribution and use of oil tanks and pumps in connection with the sale of gasolene?

A. No; I was out of that department. I was confined strictly to the lubricating part.

Q. What has been the extent of your experience with respect to the use of oil tanks and pumps by garages and other distributors or retailers of refined oil and gasolene?

A. Since my connection with the Smith Oil Company.

Q. During that time have you had occasion to come in contact with other areas than your own district in St. Louis?

A. No, sir.

Q. What has been your experience within your territory of the practices of other oil companies in this respect, where they have contracts with garage men or other distributors of oil and gasolene, which contracts are similar to yours to which you have testified? Do these garages and other retailers of gasolene use the tanks and pumps of other companies or competitors of theirs?

A. Yes, sir—competitors of theirs? No.

Q. In other words, where a competitor of yours has installed a gasolene tank and pump with a garage man or any other vendee of gasolene, that particular oil tank or pump is the only one that the garage man or distributor uses?

A. Absolutely.

Q. Does such a garage man or distributor or vendee of gasolene sell the oil product of another oil man or oil company than the party who furnishes the pump under these contracts?

A. No, sir.

Q. You say at the present time and since you have owned this company you have not made any such lease agreements?

A. I have made agreements with various garages and one or two filling stations, but they installed their own equipment. I had agree-

ments to supply them with gasolene and oil for a period of time for a certain consideration where they themselves agreed to buy only our products. It may be a year, in some cases two years, but in no case since the Smith Oil & Gasolene Company came into existence have I given away or leased pumps and tanks.

Q. But you have made contracts with these various garages?

A. Oh, yes, sir; the same as we make on lubricating oil, to protect them a certain period of time.

Q. Do I understand that by the terms of these contracts they are not permitted to buy such products as are included in the terms of the contracts from competitors of yours?

A. Absolutely so.

Q. And the terms of those contracts are for how long?

A. In most cases a year; in some cases, two years.

Q. How many kinds of contract do you have through which you lease or loan the oil tank and pump?

70 A. Just one kind of a contract applies to gas and one kind to lubricating oil.

Q. Will you send a copy of each one of those contracts?

A. Yes, sir.

Q. (By Mr. BURDEAU.) Is the lease agreement and agency agreement embodied in the same instrument?

A. No, sir. The agency agreement—of course, I have not made any.

Q. (By Mr. ZECHIEL.) You say you have not made any contracts with respect to gasolene and oil tanks and pumps since you have owned the company?

A. No, sir.

Q. Why have you ceased the practice of leasing or loaning tanks and pumps?

A. Simply because it did not pay; it was not profitable.

Q. Will you explain that more in detail?

A. Well, we in St. Louis have had the pleasure of enjoying the lowest filling station market in the country for the last two or three years, and the margin has been so small that we barely made expenses by operating through the other fellow's equipment. In most cases we could charge it to advertising and let it go at that. But since they have made a differential in the St. Louis tank wagon market in the last couple of months there is a chance to get by and make a living. But in either case we can not afford to give away or lease these pumps.

Q. For how much are you incorporated?

A. $26,000.

Q. (By Commissioner COLVER.) Your employment in the Pierce Oil Company was in the lubricating department?

A. Our business was confined strictly to what we call smokestack or lubricating business.

Q. Were your sales of lubricating oil in part to garages and other distributors of gasolene who had these filling stations?

A. No, sir; I was handling the factory trade. They had a special corps of salesmen that confined themselves strictly to garages in which I was not interested.

Q. Were you informed about the selling of lubricating oils to the garages?

A. Just occasionally I talked it over.

Q. What was the effect of these filling station contracts on the sales by Waters Pierce Company of their lubricating oils?

A. Well, it was practically the same as it is in our case. If they made any concessions in the way of giving or loaning a pump or tank to a garage they compelled them, consequently, to give them a lubricating contract out of respect to that favor.

Q. Some little time ago you said that the lubricating oil carried the garage.

A. Yes, sir.

Q. Will you explain that to us?

A. The margin of profit on lubricating oil is a great deal more than it is in gasolene. There is not much profit through a filling station on gasolene. There is in tank wagon sales. I guess in the case of the larger companies probably there was a large margin for the little fellow.

Q. So that the gasolene being sold by means of the tank equipment in itself for the smaller company was not profitable?

A. That was the only way they could handle it.

Q. And was the means of opening the market for the lubricating oil?

A. Yes, sir.

Q. And in that lay your profits?

A. Yes, sir.

Q. (By Commissioner Thompson.) I wish you would describe just how you received this pump as a package? Is it made up of several parts when it is shipped to you?

A. The pump comes in, the pump itself, in one crate, and the small parts, such as the cover and the globe, and that sort of thing, make up another package. Then the tank, of course. In most cases we have a 550 or a 100 gallon tank that comes crated by itself.

Q. Do you break up the crate, or do you send it direct to your party?

A. We send it direct. It is consigned to us at St. Louis, and we take it from the freight depot right opposite the place it is going to be installed.

Q. And they set it up there?

A. Sometimes the Bowser people set it up. We have found it convenient and profitable for us to install rather than to wait.

Q. So the package is not broken until it gets to the place where you are going to install it?

A. No, sir.

Q. (By Mr. ZECHIEL.) How much money have your com-
72 pany invested in these pumps that you have installed under these leasing agreements?

A. I would say, counting depreciation since they have been there it would run about $5,000—not more than that.

Q. At the time you installed them about how much did you invest?

A. Of course, we not only had the pump or tank to take care of but in two or three instances they put up a great large arch, and that sort of thing—some kind of an attractive arrangement. The oil company spent probably $10,000 in equipment.

Q. How many of those have you now?

A. Eight.

Q. Do you know how many there were that were included in the $10,000 investment?

A. Yes, sir; there were about twelve.

Q. I believe you gave your capitalization as $26,000?

A. Yes, sir.

Mr. ZECHIEL. You may cross-examine.

Commissioner THOMPSON. I want to ask you one question.

Q. (By Commissioner THOMPSON.) I want to read to you a paragraph from an affidavit by one Seth C. Drake, filed with the Commission in Docket No. 85, Federal Trade Commission versus Standard Oil Company of Indiana. The part of the paragraph which I wish to read is as follows:

"Affiant further says that he has been connected with the sales department of respondent for many years last past and was so connected with it when the practice of loaning and leasing tanks and pumps to customers was inaugurated, and said practice of leasing or loaning pumps and tanks, for a nominal consideration, or free of charge, was inaugurated by the competitors of the respondent, and respondent thereafter adopted such practice merely as a matter of self-defense, to meet in good faith the competition offered it by its competitors; that such practice has been and is contrary to the judgment of the sales managers of respondent, and is in their judgment bad merchandising."

I call your particular attention to this phrase:

"That such practice has been and is contrary to the judgment of the sales managers of respondent and is in their judgment bad merchandising."

Do you agree with that statement?

A. Absolutely.

73 Q. Do you think it is economically bad?

A. Absolutely.

Mr. ZECHIEL. Are there any further questions?

Q. (By Commissioner COLVER.) Following the question I asked a moment ago, will you say that the sale of or the competition in lubricating oils is substantially lessened by these pump and tank arrangements, contracts and agreements?

A. Yes. I guess it is. It is bound to be, because the sale of lubricating oils, as I said before, is very profitable, and it is a great argument as to why the man will give the other fellow a pump or tank if his lubricating business warrants him in going to that expense.

Q. Yes: that is coming at it from one side. Now, coming at it from the other side, having given him under lease or contract of any sort such a tank and pump, then thereafter the one who receives the tank and pump is bound to buy his lubricating oil from the one who furnished it, and he is not a prospective customer. That, you say, you know to be the effect with respect to lubricating oils?

A. Absolutely. It has cut down competition in the lubricating business.

Commissioner COLVER. That is all.

The WITNESS. Gentlemen, I would consider it a favor if I might catch the 4.50 train to St. Louis, if you have no further need of me.

Commissioner THOMPSON. Is there anyone here to cross-examine the witness?

(No response.)

The ACTING CHAIRMAN. You can catch that train. We are much obliged to you.

(Witness excused.)

W. L. ZUST was called as a witness by and on behalf of the Federal Trade Commission, and being first duly sworn, testified as follows:

Direct examination:

Q. (By Mr. ZECHIEL.) Give your full name.

A. W. L. Zust.

Q. With what company are you connected, Mr. Zust?

A. Interstate Oil Company, La Crosse, Wisconsin.

Q. What is your position with that company?

A. Manager.

Q. For how long had you been connected with that company?

A. Since its organization, five years ago.

Q. What was your business prior to that time?

A. I was connected with the Hawk Eye Oil Company of Waterloo.

Q. For how long had you been connected with that company?

A. Four years.

Q. What was your business with that company?

A. Chief clerk.

Q. What were your duties as chief clerk?

A. I had charge of the office work and part of the purchasing.

Q. What are your duties as manager of the present company?

A. General manager of the business, purchasing and general manager of sales.

Q. Does that include experience with the selling of gasolene?

A. Yes, sir.

Q. In the sale of it does your company handle pumps and tanks?

A. Yes, sir.

Q. What is your business practice in that respect?
A. We would purchase and sell them.
Q. Where do you buy your pumps?
A. Mostly from the Milwaukee Tank Works.
Q. At Milwaukee, Wisconsin?
A. Yes, sir.
Q. Do you buy any pumps from any other concern?
A. I have bought some from the Western Oil Pump and Tank Company of St. Louis, sometime ago, but not recently.
Q. Do you buy these pumps in carload lots?
A. No, sir.
Q. Individually?
A. Yes, sir.
Q. When you buy a pump from any one of these companies you buy them from some particular customer, do you?
A. Generally so.
Q. You have them shipped from the factory to this customer?
75 A. Sometimes the sale happens to be where you have a station, and we have it shipped to us and make delivery.
Q. Sometimes you have it shipped direct to a customer?
A. At a point where we have no station they ship direct to the customer.
Q. In your gasolene business where do you get your gasolene supply?
A. Mostly Oklahoma.
Q. You have it shipped into your State?
A. Yes, sir.
Q. Who are your competitors in your territory?
A. The Standard Oil Company of Indiana and the Nash Refining Company.
Q. Are they all the competitors you have?
A. At La Crosse; we have the Havoline at one station. Portage and Winona, the oil company of Winona.
Q. Does the Sinclair Company sell in your community?
A. They do part of it. They have a station at Minneapolis and we come in competition with them up close to Minneapolis.
Q. How about the Iowa Oil Company?
A. The Iowa Oil Company has a station at Prairie du Chein. We make Prairie du Chein and towns south of there.
Q. Do you sell oil down in Illinois?
A. No, sir.
Q. (By Commissioner THOMPSON.) Do you have the same practice as described by the previous witness of bringing the pumps and tanks in in original packages and having them broken up on the premises where they are to be installed?
A. Partly so; yes, sir.
Q. In what way do you differ with that practice?
A. In fact, I guess it is always that way. We deliver it in the original crate even though we ship it in to ourselves.

Mr. ZECHIEL. I think he testified that he does not lease and loan under contracts. Am I correct about that? I will ask him.

Q. (By Mr. ZECHIEL.) Do you lease or loan oil tanks and pumps under contracts whereby you require your lessee to use only your own products and pay only a nominal consideration for the pumps and tanks?

A. No, sir.

Q. What is your method of conducting business?

A. The tank proper?

Q. Pump and tank?

A. We purchase the tanks and sell them direct to the customers.

Q. You do not lease or loan any of them?

A. We do not lease or loan any of them; no, sir.

Q. Do you sell them for reasonable compensation?

A. Reasonable profit; yes, sir.

Q. In your competition with the oil companies who do lease and loan these oil tanks and pumps have you ever had any experience as to losing customers because of your competitors offering to put in oil tanks and equipment?

A. Yes, sir.

Q. Describe your experience in that respect.

A. A year ago or some such a matter the Standard Oil Company of Indiana allowed their customers to have these tanks. They were leased or given away; I do not know just exactly what the arrangement was.

Q. You say you do not know exactly what the arrangement was. You do know that they leased these pumps for a nominal consideration?

A. I do not know whether they got anything or not. I doubt whether they got anything.

Q. Go ahead. Excuse me.

A. Certain customers would ask me if I would put in a tank if they handled my gas. I told them no, we could not afford to. The Standard put in a tank and they got the business.

Q. (By Commissioner THOMPSON.) Could you give a specific instance?

A. Yes, sir.

Q. Please give one.

A. Swartz & Groff, La Crosse, Wisconsin.

Q. Any other?

A. That is the only one I can say definitely where they made that arrangement, but there are others that I think have made similar arrangements.

Q. (By Mr. ZECHIEL.) Do you recall any customers that you lost because of that?

A. The customer that I mentioned, when they discontinued it.

Q. When you say "discontinued," what do you mean?

A. They discontinued this practice of loaning.

77 Q. Have you had any other experience of that kind wi any competitor of yours?

A. There is another party that handled gasolene under the sa arrangement, Mr. Wheeler, of La Crosse.

After that practice was discontinued he put in another pum Now he is handling both ours and theirs.

Q. (By Commissioner COLVER.) Did you try to sell lubricati oil to these two concerns?

A. They did not handle it. One is a confectionery store a the other is a grocery store.

Q. With respect to lubricating oil, did you ever sell any lubric ing oil to any distributor of lubricating oils who had a pump tank leased or loaned to it by some other distributor of oil gasolene?

A. I do not know of any customers that had leased tanks a handled lubricating oils. They generally have had them out some suburb or outskirts of the city in the hands of some little co fectioner or little grocer.

Q. Do you sell lubricating oils?

A. Yes, sir.

Q. (By Mr. ZECHIEL.) Have you had any other experiences b sides those you have enumerated, of that kind?

A. No, not that I recollect.

Q. Do you know of any other similar experiences of anyone el along that line, within your own knowledge?

A. No, sir; I have not talked the matter over with anybody.

Q. Over how wide a territory do you actually do business?

A. About two-thirds of the State of Wisconsin and the south border of Minnesota.

Q. Do I understand you to testify that if any other companies any other cases similar to yours had happened you would n necessarily know that, if they had taken any of your other cu tomers away?

A. I would not know it, outside of the city of La Crosse or ou side of the stations where we have tank wagon distribution.

Q. You say you would not know?

A. I would not know.

Q. (By Commissioner THOMPSON.) I want to read from the af davit of Seth C. Drake, which has been offered here to be filed i Doocket No. 85, Federal Trade Commission versus Standard O Company of Indiana. I read as follows:

78 "Affiant further says that he has been connected with th sales department of respondent for many years last past, an was so connected with it when the practice of loaning and leasin pumps and tanks to customers was inaugurated, and the said pra tice of leasing or loaning pumps and tanks, for a nominal consider tion, or free of charge, was inaugurated by the competitors of th

spondent, and respondent thereafter adopted such practice merely s a matter of self defense to meet, in good faith, the competition so tendered it by its competitors; that such practice has been and s contrary to the judgment of the sales managers of respondent nd is in their judgment bad merchandising."

Would you say that this method of contracting by way of lease r otherwise for a nominal consideration of a pump and tank is ad merchandising, when bound up with the agreement that they hould not use the oil or gasoline of another competitor?

A. Only under one condition could I see whereby it would be stified?

Q. What is that?

A. That is a small company has competitors that have service sta-ons. They cannot afford to put in a service station and they might fford to put in one of these pumps in the hands of one of the dealers r make them act as their agent or under some similar arrangement of hat kind.

Q. That would have the effect, would it not, of cutting off a com-etitor from getting his oil except from the person who was dis-ributing?

A. It would depend upon the conditions under which the arrange-ent was made, whether it would be an exclusive arrangement or low a fellow to handle both.

Q. Is there any situation that you know of, or any case where, aving given a pump or tank for a nominal consideration permission given to handle a competitor's oil?

A. From the same pump?

Q. Yes.

A. No.

Q. As a matter of fact, it does cut down competition in that respect, es it not, where they give a pump and tank for a nominal consid-ration, the company not permitting anybody else to put their oil hrough that tank and pump?

A. Certainly.

Q. (By Commissioner COLVER). And quite irrespective of put-ting gasolene through that pump, the installation of the pump under those circumstances has an influence on the sale of the ubricating oil?

A. Yes, sir.

Q. And would tend to limit the competition or destroy it in the ubricating oil, would it?

A. As I understand the question, if there is an arrangement made hereby you lease a tank or pump to a customer, he naturally buys ubricating oil from the party who makes that arrangement.

Q. (By Mr. ZECHIEL.) Then your answer would be yes to Com-issioner Colver's question?

A. I did not exactly understand the question, and I thought I ould put it that way.

Cross-examination:

Q. (By Mr. MacEwen.) Assuming that there were a number o companies in the territory instead of simply the proposition o somebody else putting in one tank and one pump; it would not b a practical thing for ten competitors to put in a tank to the sam garage or the same dealer, would it?

A. Hardly possible. They would not have the room to take car of it.

Mr. MacEwen. That is all.

Q. (By Commissioner Colver.) The alternative, then, would b for the garage man to furnish his own pump and tank, would it?

A. Yes, sir.

Q. (By Mr. MacEwen.) Would not the alternative be to eliminat competition rather than to furnish his own tank and pump, provide these tanks and pumps are furnished free of charge or at a nomina rental?

A. Yes.

Redirect examination:

Q. (By Mr. Zechiel.) In your connection with this company including other experience you have had with oil companies, hav you had occasion to visit the various garages in your territory?

A. Yes, sir.

Q. What has been your experience as to whether or not th
80 garages or other distributors of refined oil and gasoline hav more than one such an equipment, oil tank and pump through which they sell gasoline or refined oil?

A. They have more than one?

Q. Yes, sir. Have they or have they not?

A. It is very seldom they have more than one.

Q. What is the fact about that? Do the various retailers of gas line handle at the same time the oil products of more than one oi company?

A. They most all handle more than one grade, especially in th lubricating line.

Q. I do not mean the lubricating line; I mean gasoline.

A. Very seldom they handle more than one grade of gasolene.

Q. I want to ask you still further: Over how much of your geo graphical territory does this experience to which you have just testified extend with respect to the buying and selling of gasolen and the use of oil tanks and pumps by garage men?

A. Mainly Wisconsin. We have no stations in Minnesota at all.

Q. Do you have any personal knowledge with respect to any geo graphical territory other than that in Wisconsin?

A. No, sir.

Q. Let me ask you in that connection, again, if the effect of thes tying contracts .. the lease and loan of pumps tend to stifle and suppress competition in the sale of gasolene and lubricants, or would the tendency be to cause the garage people and other vendees t

have two or three sets of pumps from different oil companies? What would be the effect, in your experience?

A. If they had two or three?

Q. No: in your experience, what is the effect of these tying contracts? We will use the term in dollars and cents. Does it cause a garage man to deal only in one kind of lubricating oil and gasolene from one wholesaler, or does it cause the garage man to put in several equipments to handle its products?

A. There are very few garages that will handle more than one kind of gasolene.

Q. Your answer, then, is that it eliminates competition?

A. In the gasolene part of it: not so much in the lubricating part of it. They handle various kinds of lubricating oils.

Q. But so far as gasolene is concerned the tendency is to eliminate competition?

A. Yes, sir.

(Witness excused.)

H. E. WORMHOUDT was called as a witness by and on behalf of the Federal Trade Commission, and being first duly sworn, testified as follows:

Direct examination:

Q. (By Mr. ZECHIEL.) Where is your place of business?

A. Des Moines, Iowa.

Q. With what company are you connected?

A. Manhattan Oil Company.

Q. How long have you been connected with the Manhattan Oil Company?

A. A little over four years.

Q. What was your experience prior to that time?

A. I was not in the oil business. I was general agent for the Burlington Railroad at Des Moines prior to that time.

Q. What is the business of your company?

A. The making of gasolene and kerosene and lubricating oils.

Q. What is the general extent, geographically, of the territory covered by your concern?

A. The State of Iowa, about two tiers of counties in Missouri, the two northern tiers.

Q. Do you ship your gasolene products back and forth between your stations?

A. We do in drums. We have no tank station, so-called, in Missouri. We ship in drums to Missouri.

Q. You have your gasolene products shipped in to you from other States than those two States?

A. Yes, sir; we have gotten some from Oklahoma and Kansas.

Q. Do you also handle the pumps and tanks in which this gasolene is sold?

A. We do.

Q. Where do you get your pumps and tanks?

A. Milwaukee Tank Works, principally.

Q. How do you have those pumps shipped in—in carload lo
or individual orders?

82 A. Lots of approximately twenty-four to thirty, less tha
carload lots.

Q. When you have your pumps shipped in do you have the
shipped to a particular customer, or are they consigned to yourself

A. Principally to ourselves. Sometimes direct from the facto
to the customer.

Q. And when they are sent to the customer they are delivered
that party's place of business?

A. Yes, sir. When they come direct from the factory they deliv
at the railroad station. He installs them himself and hauls the
from the railroad station to his place of business.

Q. You never install them?

A. No, sir: we never install them.

Q. When you have them consigned to yourself what is the pr
cedure?

A. They come into our place of business at Des Moines and
haul from the railroad station to our place. We can deliver the
to the railroad station for reshipment. That is all we do wi
them.

Q. I suppose you install them in the city of Des Moines?

A. We would not install them at all in the city of Des Moi
—never have: I cannot say what we would do.

Q. Then I understand you to say that if you have a custo
in the city of Des Moines you have it shipped directly to him?

A. We would deliver in such case from our place of busin
I imagine we would. We have never had a case of that kind.

Q. (By Commissioner THOMPSON.) When you keep it in stor
you keep it in the original package: you do not break it up.
you?

A. We do not break up the original package at all.

Q. (By the ACTING CHAIRMAN.) These packages come in th
parts—the cylinder, crated separately: then the breakable pa
crated separately, and then the tank. Is not that the ordinary wa

A. Generally in three parts: yes, sir.

Q. (By Mr. ZECHIEL.) In your connection with your concern
what are your duties?

A. Manager in the general supervision of the business, buyi
and selling.

Q. In that connection do you travel about over your te
ritory?

83 A. I do to a limited extent: yes, sir.

Q. To what extent do you come in contact with garages a
other individuals dealing in gasolene?

A. Just as I make trips out of the state to points where they h
stations. I generally drop in and see those fellows.

Q. Have you had any other actual personal experience with respect to garages about over the country than those in your actual field or territory in which you sell?

A. I have not.

Q. In that territory you have been over most of the area in a personal way?

A. Yes, sir. Wherever we are represented I have been over the ground in those towns.

Q. Do you ever lease or loan pumps and tanks to customers?

A. We have one case where we have made a loan of a tank.

Q. In that case what were the terms under which the loan was made?

A. Only a verbal agreement.

Q. What was the effect of the agreement?

A. That we would furnish without charge this pump, and that so long as the pump was used our goods should be used, should be purchased by this man to whom we had loaned the pump. But I might say that we were jockeyed into that proposition. We did not do that wilfully.

Q. What do you mean by that?

A. I mean that competitors had made an offer to do that or to take from us that customer's business.

Q. Who was the competitor you speak of?

A. The Standard Oil Company.

Q. That is the Indiana corporation?

A. Yes, sir.

Q. What are the detailed facts in that case?

A. I have been trying to find out what the facts are.

Q. (By Commissioner THOMPSON.) You have not yet found out?

A. I did not.

Q. (By Mr. ZECHIEL.) It is a fact, however, that you were attempting to sell your pump equipment to a customer of yours; you had been negotiating for the sale, had you?

A. Not in that case; no, sir.

Q. I am trying to learn how you came finally to lease or loan the equipment. What were the——

A. If I may explain the case, it was this: We had the man's business. He had an old worn-out pump. He said, "I am able to get a pump free of charge provided I give my business to this other concern." It was rather a good account. We had sold the man lubricating oil in large quantities. After considering it, we came to the conclusion that in order to hold what we had we would do as much as he represented the other man had offered to do. Since that time I am not so sure that the case was represented to me correctly.

That is the only case we have, however, except we have fallen heir to a couple of stations we have taken over from other companies. They were of long standing and we have not been able to break them as yet.

Q. What do you mean by "breaking them up as yet?"

A. It is our policy not to do that thing.

Q. What do you mean—lease or loan oil or gasolene pumps and tanks for a nominal consideration under tying contracts?

A. Yes, sir.

Q. You mean you have inherited a few oil tanks and pumps under such a contract?

A. We have inherited two at Racine, Iowa, where we buy stuff from the Consumer's Oil Company. They were in effect at the time we took this station over. They are still in effect. We have the place about three months. We have made several efforts to discontinue that arrangement but have never been successful.

Q. (By the ACTING CHAIRMAN.) I am interested in your statement that you would like to break up these two outstanding contracts that you have succeeded to. Why do you want to break them up?

A. It is not a proper arrangement, not a good arrangment from a business standpoint, Mr. Murdock.

Q. You do not regard it as good merchandising?

A. I do not.

Q. Why not?

A. If it is good merchandising there is no limit to which it can be carried. You might just as well furnish a man a truck and furnish him the other equipment in his garage. It might very easily lead to that.

Q. I wish you would explain that. I do not follow you on
85 the truck proposition. What is the difference between a pump with a tank attached to it and a tin can containing gasolene?

A. I do not know that I get your thought, Mr. Murdock.

Q. If you sell a quantity of gasolene to a man, in a container, you may sell the container to him with the gasolene and it would be good merchandising?

A. Yes, sir; so long as we get a profit on the container it would be; yes, sir.

Q. If you give him a pump and tell him that he shall sell only your gasolene through that pump, and then you charge a price for the gasolene that nets you a return for the value you put into the pump, the money you spent to get the pump to give to him, why is it poor merchandising?

A. Because it never works out that way. You cannot, under the present conditions, charge sufficient for your gasolene to cover the offset. You cannot get more for your product than your competitor is getting; and the margin that you enjoy at the present time does not justify contributing this pump.

Q. Does not that depend somewhat on what the gasolene costs in the first instance?

A. It does; yes, sir. I am speaking of present conditions now. I say it is not warranted under present costs that we have to pay for our stuff, freight and overhead.

Q. If you had a competitor who could get his gasolene much cheaper than you can buy yours, would it not be profitable and a proper merchandising proposition for him to sell the pump, not give it away?

A. It might be.

Q. (By Commissioner THOMPSON.) You would not consider it fair, though, would you?

A. I would not consider it fair. I would simply hold that to be an advantage that the other fellow's capital gave him. My ability to sell merchandise might be as great as his, but I would not be able, under that proposition, to do business on a parity with him.

Q. (By the ACTING CHAIRMAN.) Then the deduction that I draw from your position in the matter is that you think it is unfair for one man to occupy a position, even by virtue of capital, whereby he could force another member of the community to buy at a loss. That is about your position?

A. That is my view; yes, sir.

Q. (By Mr. ZECHIEL.) To about how many stations do you furnish oil and gasolene?

A. We have twenty-one in Iowa.

Q. Over your whole territory.

A. In Nebraska—we operate as a separate proposition—we have about twenty.

Q. You have some forty stations, then?

A. Yes, sir.

Q. Who are your competitors in the two territories?

A. The Standard Oil Company——

Q. The Standard Oil Company of Indiana?

A. Yes, sir. The Consumer's Refining Company, S. L. Collins Oil Company, Cedar Rapids Oil Company, Transcontinental Oil Company.

Q. Is the Sinclair Oil Company in your territory?

A. Not directly. We do not have the Sinclair at any of our stations, although they are generally in the State of Iowa.

Q. How about the Iowa Oil Company?

A. We never come in contact with them.

Q. Do you know, as a matter of fact, their geographical distribution?

A. I do not.

Q. You do not know that there are any in this territory?

A. No; I know nothing of the Iowa Oil Company.

Q. Have you ever had any of your competitors interfere with your general trade through the use of these leases and loans other than the one you described a while ago, the experience with the Standard Oil Company?

A. Yes, sir. We have had a number of cases in addition to that.

Q. Describe those in detail, as you recall them.

A. Right now, that is, less than a week ago, we lost a customer's business in Iowa. The man's name was Zimmerman, at Peru, where

the Standard Oil Company of Indiana agreed to deliver to him a tank and pump. The man ceased dealing with us because of this promise. The delivery of the equipment has not been made, but he holds a contract to that effect.

Q. Do you know through representations directly in your conversation and dealing whether they offered to install that tank and pump at a nominal consideration or not?

A. I cannot speak from personal knowledge, only as my agent reports the matter to me.

87 Q. (By Commissioner THOMPSON.) How long ago did the Standard make that offer?

A. About two weeks ago. I learned about it a week ago.

Q. Do you know the name of the agent?

A. No, sir.

Q. Can you find it out?

A. Yes, sir.

Q. Will you find out and let us know?

A. I will.

Q. I would like to know at the earliest possible date.

A. Yes, sir; I can give the information.

Q. (By the ACTING CHAIRMAN.) So we may be sure that the record carries it, at what point was that in Iowa?

A. Peru.

Q. Zimmerman, at Peru?

A. Yes, sir.

Q. (By Commissioner THOMPSON.) Will you give us the name of your agent who told you this?

A. H. D. Shoenberger.

Q. Is he at Peru?

A. He is at Winterset. Peru is an outlying point that he covers from Winterset with his truck service.

Q. (By Mr. ZECHIEL.) What other instance can you relate?

A. A case in the city of Des Moines where we enjoyed the business of the Cass Meat and Sausage Company who operated quite a number of trucks. We lost it, due to the fact that the Transcontinental Oil Company, which was then known as the Gasolene Supply Company, installed a pump without any charge whatsoever.

Commissioner THOMPSON. Is that one of the respondents in this matter?

Mr. ZECHIEL. It is not.

Mr. DOW. That company has taken over the business of the Riverside and Eastern and Riverside and Western Oil Company.

Q. (By the ACTING CHAIRMAN.) How recent was this transaction?

A. About sixty days ago.

Q. (By Mr. ZECHIEL.) What other instances can you relate?

A. There have been a great many. I can not call the names of the garages. One that I recall, however—I can not think of the name; I know the location of the place at 8th and Mulberry in Des Moines—the Cedar Rapids Oil Company furnished the equipment.

Q. You have testified that there were numerous instances of this kind. When you say numerous instances of this kind, what, in general, are you referring to?

A. We come in contact with that thing through our agents.

Q. Just to what are you referring when you say "that thing"?

A. The loaning of pumps and tanks.

Q. Under tying contracts without reasonable consideration?

A. Yes, sir.

Q. What is your statement in that respect, your general experience in that respect?

A. We come in contact with it very frequently through our agents where we lose business. Of course, they being commission men, are as much interested in retaining business as I am, so that our attention is very readily called to such matters that have come up quite a number of times in the past six or eight months.

Q. Is it your experience that you have lost considerable business on account of the practice you have just referred to?

A. We have.

Q. From your experience in and about over that territory what is the fact as to whether or not the garages generally have more than one equipment for handling refined oil and gasolene?

A. I have never seen a garage that had over one equipment.

Q. Also your experience is that they buy gasolene from one company only, so long as they are operating under a lease similar to that which you have described before?

A. Yes, sir.

Q. (By the ACTING CHAIRMAN.) Before cross examination, what have you to say on the proposition that there is a larger margin on lubricants than there is on gasolene, and that the sale of the lubricants carries the gasolene station? What has been your experience along that line?

A. The margin is considerably wider in lubricating oils, and where there is such an agreement and they loan such a pump it generally follows that the dealer that is favored by the loan will buy his lubricating oils from the party loaning him the pump.

Q. Then it is quite possible that the motive for giving or leasing the pump at a nominal figure would be not so much for the profit made out of the sale of a single company's gasolene as it would be that it pushed the sale of that company's lubricating oils?

A. I would say the motive would be equally as much to promote the sale of lubricating oil as the sale of gasolene.

Q. The lubricating oil is not handled through the pump?

A. It is handled through a different type of pump—small pumps—generally.

Q. Is it the practice in some cases to give that pump away or to lease it?

A. I know of no cases of that kind. That equipment is generally owned by the garage man. It is not very expensive: he can afford to buy that and own it outright.

The ACTING CHAIRMAN. Is there cross-examination?

Mr. MACEWEN. Yes, sir.

Cross-examination:

Q. (By Mr. MACEWEN.) Does your company operate in Nebraska?

A. Yes, sir.

Q. In Nebraska you have companies that you come in contact with other than the Standard of Indiana and the companies that you have mentioned?

A. I think that is true, although I do not manage the Nebraska company, Mr. MacEwen.

Q. You are familiar with the fact that the Indiana company is a different company from the Standard Oil Company in Nebraska?

A. Yes, sir.

(Witness excused.)

W. E. MACEWEN was called as a witness by and on behalf of the Federal Trade Commission, and, being first duly sworn, testified as follows:

Direct examination:

Q. (By Mr. ZECHIEL.) Give your name, please.

A. W. E. MacEwen.

Q. Where is your place of business?

90 A. Our general offices are at Cleveland, Ohio.

Q. With what concern are you connected?

A. Secretary and general manager of the Nash Refining Company.

Q. How long have you been connected with that company?

A. About nineteen years.

Q. In the same capacity?

A. No, sir.

Q. What were the various capacities?

A. I have been in the traffic department of the company, and also acted as counsel in matters, and was made secretary the first of this year.

Q. What is the general geographic territory over which your company does business?

A. We operate in Ohio, Indiana, Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, Nebraska, Kansas, Missouri, Oklahoma, Arkansas, Mississippi, and Kentucky.

Q. (By the ACTING CHAIRMAN.) What is your company?

A. Our company is a corporation organized under the laws of the State of Ohio. We are engaged in producing, refining, and marketing petroleum and its products.

Q. (By Mr. ZECHIEL.) During your experience in the oil and gasolene business have you had occasion to come in contact with the distributing centers? By that I mean the garages and various other retailers of gasolene?

A. Yes, sir.

Q. To what extent have you had such an acquaintance?

A. I have been pretty close to the operation of our business in the traffic department involving transportation, and I necessarily became familiar with the marketing conditions and practically all phases of the business.

Q. Have you been about over your territory generally visiting numerous garages?

A. Yes, sir.

Q. Who are your competitors in your various territories?

A. Well, it really includes all the leading refiners and shippers of that particular product.

Q. And in connection with that, the Sinclair Refining Company?

A. Yes, sir.

Q. The Richardson Lubricating Company?

A. Yes, sir.

Q. And the Iowa Oil Company?

A. Yes, sir.

Q. The C. L. Smith & Gasolene Company?

A. Well, from the testimony to-day I would assume we do.

Q. The Oklahoma Producing & Refining Corporation of America?

A. Yes, sir.

Q. (By the ACTING CHAIRMAN.) Of course the Standard of Indiana is a competitor?

A. Yes, sir; as well as the Standard of Nebraska, particularly the Magnolia and other Standard Oil corporations.

Q. (By Mr. ZECHIEL.) Do you come in contact with the Texas Oil Company?

A. Yes, sir.

Q. In what field?

A. We come in contact with them more in the south than anywhere else, and probably in Ohio in recent years to some extent.

Q. Do they sell in competition with you in Illinois?

A. Yes, sir.

Q. In any of the other States of the western central group?

Q. (By the ACTING CHAIRMAN.) What is the competition in Kentucky?

A. The Standard Oil Company of Kentucky is our principal competitor in Kentucky. Then there are a great many jobbers that operate out of Louisville—the Stoll Oil Company, and I do not know whether the Sinclair is in Kentucky or not.

Q. What about Arkansas?

A. We have a distributing plant at Little Rock. We come in competition there with the Standard Oil Company of Louisiana and with a number of jobbers; also the Texas Company and the Gulf Company in Arkansas.

Q. Do any of those Oklahoma companies come East? They must, do they not?

A. Yes, sir; a great many of them do.

Q. (By Mr. ZECHIEL.) Do you deal also in pumps and tanks in connection with your gasolene business?

A. It has not been our policy to do that. We probably have, exclusive of the State of Nebraska, some ten or twelve pump arrangements that were put in a great many years ago. I have recently found that contrary to our instructions and policy some such arrange-
92 ments were made in Nebraska. I discharged the manager two weeks ago for violating that policy.

Q. When you say "violating that policy," just what policy do you refer to?

A. The giving away of pumps and tanks in order to secure the business from garages or dealers.

Q. Do I understand you to testify that you do not sell pumps or tanks for a reasonable consideration?

A. We do not.

Q. You do not deal in pumps and tanks at all, then, except in the incidental way?

A. That is all, excepting one case that I handled personally very recently in which I drew a contract myself stipulating that it would be void in case the Federal Trade Commission ruled against the practice. We did that in order to hold a customer in Jackson, Mississippi who had built a new garage. That would cover the extent of our pump operations.

Q. (By the ACTING CHAIRMAN.) Mr. MacEwen, can you give us in narrative style just how that case came up?

A. Yes, sir. We had been selling the dealer in Jackson. I can not recall his name, now; we have so many of them, but I would be very glad to secure it. This dealer was putting up a garage in the center of town. Another oil company had offered to furnish the equipment free of charge, and we were told that if we did not do it they would put in the other equipment. In order to protect our interests in that particular case I drew a contract to put a pump in. It has not been furnished up to this time.

Q. (By Commissioner THOMPSON.) What is the name of the other company?

A. I cannot give you that, now, either. There are so many of these companies. I would be glad to secure it for you.

Q. (By the ACTING CHAIRMAN.) What do you estimate that that pump would cost you?

A. The pump and tank combined would probably cost us around four hundred dollars.

Q. Apart from the competitive necessity that you are under in making such a contract, did you consider it a good business proposition?

A. I certainly did not. I think it is a pernicious practice.

Q. Wherein is it pernicious?

A. It is pernicious in this way, that it tends to or can tend in time, as the automobile industry grows and as the garage becomes a substantial business—it can tend to put the control of the garage business in the hands of a few large companies that may have capital enough to finance that kind of competition—giving away of something to get business, thereby eliminating competition so far as the other companies are concerned that can not afford to finance an extensive national campaign of giving away four or five hundred dollars every time they get a contract.

I have on my desk to-day a request from a garage to sell our lubricating oils if we will furnish a pump. It is not good business practice to give anything away in order to secure business or to stifle competition in my opinion.

Q. Wherein, as a business man, do you differentiate between the gift of a pump for the sale of a commodity like gasolene, and a pure quantity discount?

A. It seems to me there is quite a considerable difference there. A quantity discount might be justified by the elimination of considerable overhead or expense that would be involved in delivering, we will say, in five or ten gallon lots. Probably a quantity discount would be a reasonable practice, whereas the giving away of four or five hundred dollars worth of material would not be a reasonable practice. If the quantity discount were given, the chances are it would be a reasonable one. I do not know very many other reasonable ones. Everybody could perhaps do that and save it in their overhead; whereas, you could not afford to invest four or five hundred dollars every time you went out to get a piece of business, particularly at the margin you have on gasolene.

Q. Does it ever occur to you that the situation now differs materially from the old times when trade was small, units were small? In your boyhood it was quite common for a merchant to give something "to boot." It was in the shape of a gratuity. Giving a pump is something more, as I see it from what I have heard to-day, than giving something "to boot," is it not?

A. Yes, sir; because you surround that with an ironclad agreement to compel that customer to buy your goods during the time he has that pump in there, whether the quality of the gas deteriorates or not. He is under that obligation to use your goods exclusively. You immediately affect the entire petroleum industry under that kind of contract.

Q. I asked that question because you say this practice, in your opinion, is pernicious——

A. I think it is pernicious because of its tying feature and because of the economic feature. I can not conceive of any logical reason

why the oil industry should furnish the equipment in order to sell the goods, any more than a cigar company would furnish fixtures to a man who bought a cigar store. I think it is a bad proposition. I think it tends to concentrate business among a chosen few. That would not be bad if it did not tend to eliminate competition. But these things all tend to eliminate competition and can be carried to a much greater extent. As I say, we can go in and give trucks or more elaborate equipment, depending on the capital we have. My company can afford to go into this pump proposition and give pumps away if it is going to be permitted.

Q. Can you add anything to what has been said here to-day about the fact that the sale of the gasolene with the gift of the pump or the lease of the pump at a nominal figure is used as a device for the sale of lubricating oils?

A. I think that is true to a considerable extent. The object in giving the pump is to find a market for the gasolene, a method by which to distribute the gasolene. Of course the contract carries with it a clause that they shall use all of their petroleum products in return for giving that pump and tank. I do not believe you can give a pump and tank and make any money out of gasolene.

Q. (By Mr. ZECHIEL.) What has been your experience out through your territory as to the use of more than one pump or tank equipment by various garages or retailers generally?

A. There are some cases of that kind, but they are very limited. Where I have found those cases it has been due to another reciprocal proposition. For instance, a garage might be the agent for a truck. They might have one of our pumps in there, and some other large company is buying great many trucks in there, and they will put one of their truck customers there. The is the only case I know of where there are more than one company's tank and pump put in a garage.

Q. So that in the ordinary course of business among the ordinary garage people and retailers of gasolene, the universal practice is to have just one pump outfit?

A. Yes, sir.

95 Q. And that particular garage or retailer sells just the gasolene product of one company?

A. Yes sir. The difficulty that our company is in right now notwithstanding the Commission's order, the practice is still being continued by other companies. For instance, the Collins Oil Company in Iowa are putting out pumps: and my company is in competition with them.

Q. (By the ACTING CHAIRMAN.) Who are the Collins Oil Company?

A. Jobbers in the State of Iowa.

Q. At Des Moines?

A. Yes, sir. There are other companies that are putting them in, according to the reports we get. We not only lose business but it prohibits us from getting new business.

Q. (By Mr. BURDEAU.) I do not believe that question has been covered—the extent to which you had suffered.

A. It is very extensive so far as the dealers' business is concerned. Our dealers' business, excepting in certain territories, is very limited, because we have refused to engage in those practices. Perhaps the business we have lost by reason of it is not nearly as great as the business we have failed to get by reason of refusing to indulge in that practice in our market.

Q. Have you found numerous instances of that kind that you can enumerate?

A. Yes, sir; I can furnish you in a short time, I think, with extensive statistics that in the State of Nebraska where the manager has given pumps away contrary to our instructions we have an extensive dealers' business, but where we have not been giving them away we have not.

Q. (By Mr. ZECHIEL.) Is it your opinion that your increase is due directly to the use of these contracts whereby you give or lease pumps?

A. To a considerable extent. I know in the city of Omaha that is absolutely true.

Q. It is your opinion that you have lost a large volume of business because of the use by your competitors of these contracts by which they lease one of the pumps for a nominal consideration?

A. I would put it in this way, that we have failed to secure a large volume of business that we could have secured otherwise.

Q. Is it a fact or not that you have lost a large amount of business.

A. Oh, yes; we have lost business, too.

Commissioner THOMPSON. Is there any cross-examination?

(No response.)

Q. (By the ACTING CHAIRMAN.) Before you go I would like to ask you this. It is not just pertinent to this question, but it will refer into it finally.

What about the new filling station? How long have we had it?

A. The filling station's most phenominal growth has probably been within the last three or four years. It probably started ten years ago, but it has grown. At that time it was an uncertain proposition in the oil industry. We did not know whether it was going to be a permanent fixture. To-day it is. It has a permanent growth.

Q. Do you consider it a profitable arm of the industry, considering the high priced real estate it occupies, because it must be in a more or less favorable location? I was just wondering whether ordinarily it was a profitable thing.

A. I have given a great deal of study to the question, and I would say that I do not consider it a profitable investment. You have exceptions to that. We have filling stations that are very profitable. Some I have in mind; but where you pay an expensive rate for property, I do not think you are making any money in

your investment in that kind of stations. It brings to my mi
that it has been suggested that the use of these pumps is necessar
in order to meet that kind of competition; but the garage man wou
still sell gasolene if he had to buy his own equipment.

Q. So, upon the whole, so far as its development is concerne
you do not look upon the general run of filling stations as an econom
cal addition to the service?

A. Oh, I think it is an economic addition. I think, probably—

Q. I mean, an addition to the service which makes for the econo
ical handling of the product?

A. I think probably it will be in time, because the more they
in the more the home storage will be abandoned. They build
the gallonage of the filling station, and it will be developed if it
not now. I do not know about other companies, but I am sure
will be an economical way of handling gasolene. It fills up the g
lonage as your trucks increase and as your motor cars increase a
as they buy their lubricating oils more and more at the filling s
tions.

97 Q. (By Commissioner THOMPSON.) Some one has said th
this giving away of pumps, and so forth, by these compani
puts a tremendous leverage in the hands of the big concerns. W
not the filling stations put an even greater leverage in the hands
the big concerns?

A. I think not. With fair competition and the elimination of th
kind of practices the independent refiner, with proper manageme
does not have any difficulty with, we will say, the Standard Oil Co
pany. My own opinion is that the Standard Oil Company is t
cleanest competition that we have in these territories.

Q. The keenest?

A. The cleanest. I say that advisedly, because I have fought w
them for a great many years.

Q. (By the ACTING CHAIRMAN.) Probably the keenest and t
cleanest?

A. No; I do not think it is the keenest, as the people in our ter
tories that are engaged in these practices such as we are talking ab
here are the keenest.

Q. (By Mr. ZECHIEL.) The Standard Oil Company is engaged
these practices everywhere, is it not?

A. No; they are not in the State of Nebraska. I do not think th
have any such arrangement. I am familiar with it in that St
I think every other oil company but the Standard have—and I a
not holding a brief for the Standard, either.

The ACTING CHAIRMAN. Is there any cross-examination?

(No response.)

The WITNESS. May I leave just one more thought with the comm
sion? On the so-called referendum that there has been a great d
of criticism of in the petroleum industry, of all the oil companies
the United States—the refiners I am talking about now—there
comparatively few that market their petroleum products direct to

nsumers, and therefore are not directly interested in this particular
oblem; so that a re*f*rendum of the petroleum industry, particularly
it is voted upon by people who are not engaged in marketing to the
nsumer, would not have very much weight on whether the question
proper or not.

(Witness excused.)

Mr. ZECHIEL. Here is an agreed statement, so far as we have gone,
ith the Sinclair Company.

Commissioner THOMPSON. Does the testimony which we have heard
conclude the testimony of the commission?

Mr. ZECHIEL. No. It is all the witnesses that there are here
to-day. Two or three of the witnesses reported that they were
and they were not all subpoen'ed for to-day. We subpoen'ed some
day and some for to-morrow and, I think, others not until Monday.

The ACTING CHAIRMAN. Here is the agreed statement of fact with
e Sinclair Company, but you say it is not complete?

Mr. ZECHIEL. The agreed statement is complete. It covers all the
idence except the economic situation.

Commissioner THOMPSON. Had we better not hear the Sinclair
ople on the economic situation?

Mr. BURDETT. Vary the procedure and let them put in what they
ve to say by way of argument.

Mr. ZECHIEL. I do not know of any reason why we should not hear
em to-day.

Commissioner THOMPSON. Suppose we ask the Sinclair Company
ether it cares to put in at this time any evidence on the economic
estion involved.

Mr. OSBORN. I do not know that I am prepared to say right at this
oment. It was my understanding when this stipulation was entered
to that there were two or three propositions reserved here on which
re would be testimony introduced on behalf of the commission so
r as the Sinclair case is concerned.

Mr. ZECHIEL. I do not know now, Mr. Osborn, whether you were
re at the beginning of the session?

Mr. OSBORN. No; I was not.

Mr. ZECHIEL. It was ordered by the commission that all the evi-
ce be taken for all the companies at the same time, and all the
idence that has been introduced was introduced on that theory.

Mr. OSBORN. I am sorry I did not know about that. I did not know
t you were going to reach the Sinclair case at all. If I had known
t there would have been probably some questions that I would
e liked to have asked some of these witnesses.

Mr. ZECHIEL. There is one more witness who advises me that he
res to be heard.

The ACTING CHAIRMAN. Very well.

99 JOSEPH F. KUNZ was called as a witness by and on behalf of the Federal Trade Commission, and being first duly sworn testified as follows:

Direct examination:

Q. (By Mr. ZECHIEL.) With what company are you connected?
A. Kunz Oil Company.
Q. In what capacity?
A. Secretary.
Q. How long have you been secretary of the company?
A. Fifteen years.
Q. Is that as long as you have had any connection with the company?
A. No, sir.
Q. How long have you been with the company?
A. About twenty-five years.
Q. Have you had any other experience in the oil and gasoline business except your connection with this company?
A. No, sir.
Q. Prior to the time you became secretary what was your capacity with the company?
A. Salesman of the company.
Q. In your experience with that company have you come in contact generally with the garage people and other distributors or vendees of gasolene products?
A. Yes, sir.
Q. What is the geographical territory in which your company does business?
A. Minnesota, North Dakota, South Dakota, and part of Montana.
Q. Do you do a general business over the entire portion of the States?
A. Yes, sir.
Q. Over all of Montana or part of Montana?
A. Part of Montana.
Q. Do you also deal in pumps and tanks in connection with your business?
A. No, sir.
Q. You do not sell any pumps or tanks at all?
A. No, sir; just these small sixty-gallon pumps; but they are lubricating oils.

100 Q. What is commonly known as the Bowser pump? You are acquainted with that?
A. Yes, sir.
Q. You do not handle that type pump at all?
A. No, sir.
Q. During your experience with your company have you had occasion to visit the various garages and retailers?
A. Some; not very recently.

Q. Do you do business with the garage or retail people?
A. Not very much with the garages: we do a retail business.
Q. You do a retail business yourself, you mean?
A. Yes, sir.
Q. Describe in a general way the kind of business you are engaged

A. Our line mostly is in the lubricating business, lubricating oils and grease, although we handle gasolene and kerosene. Most of our gasolene is sold to truck owners. We do not have any filling stations and we do not sell but to a few garages at this time.
Q. Have you any explanation or reason for not selling to garages?
A. Well, the reason for it mostly is on account of making arrangements for tanks and pumps, whereby other companies will furnish them the gasolene providing they will put in the outfit and use their pumps.
Q. Do you mean that the garage people with whom you do business and the other retailers with whom you do business have arrangements with various oil companies under contracts by which the oil companies lease or loan them oil tanks and pumps for a consideration that they are not to put in such pumps the gasolene of a competing company?
A. Yes, sir.
Q. You say your reason for not conducting a larger business in gasolene with these garages and other retailers is that the numerous retailers have entered into such contracts with various other oil companies?
A. Yes: that has a whole lot to do with it.
Q. Do you know the names of any of the competing oil companies?
A. In our city the Sinclair and the Standard.
Q. (By Commissioner THOMPSON.) Of Indiana?
A. Of Indiana: yes, sir.

Q. (By the ACTING CHAIRMAN.) Your city is what?
A. Minneapolis.

Q. (By Mr. ZECHIEL.) Are there any other companies generally in Minneapolis with whom you come in competition?
A. No, sir: not that I know of. I do not think so.
Mr. OSBORN. Did the witness say Minneapolis or Indianapolis?
The WITNESS. Minneapolis.
Q. (By Mr. ZECHIEL.) In your experience in connection with these garages and other retailers, what is the fact about whether or not a garage has more than one oil tank and pump equipment?
A. I do not think they have—not to my knowledge.
Q. Do you know of any case where a garage or any other retailer has more than one such equipment for selling gasolene products, refined oil and gasolene products?
A. No, sir.

Q. Dou you know whether or not these various garage people an other retailers buy and sell gasolene of more than one company?

A. No, I do not.

Q. You mean to say you do not know whether they do or not?

A. They do not sell only to one company.

Q. Have you ever lost any business because of these tying co tracts, that you know of?

A. Yes, we have.

Q. Enumerate some of those instances or all of them.

A. The names of the companies?

Q. Yes, and all about the whole situation.

A. We have lost one—the Peter Faber Company. We sold the They asked us to furnish them a pump and tank, which of course w could not afford to do, and would not do, so they bought from so other company.

Q. Do you know what company they bought from?

A. From the Standard.

Q. The Standard of Indiana?

A. Yes, sir.

Q. (By the ACTING CHAIRMAN.) How recent is that?

A. About a year ago.

Q. (By Mr. ZECHIEL.) Do you know whether or not the Standa puts this pump in under what is commonly known as the lease agr ment?

A. I am not in position to say, because I do not know. This only what the customers tell us, that they agreed to put in a pum and tank.

102 Q. It is a fact, however, that this particular customer ask you to put it in and you refused to do it?

A. Yes, sir.

Q. Have they bought any gasolene from you since the installat of the pump?

A. No, sir.

Q. (By Commissioner THOMPSON.) Did you try to sell him any

A. Yes, sir; we called on him but he never bought any more fr us since then.

Q. Did he tell you why?

A. Well, he felt that on account of using their pump and tank was not policy for him to buy his gasolene from us.

Q. (By Mr. ZECHIEL.) Did you try to sell him any lubricants?

A. Yes, sir.

Q. Did you sell him any?

A. Yes, sir.

Q. (By the ACTING CHAIRMAN.) You did?

A. Yes, sir. He buys lubricating oil from us.

Q. (By Mr. ZECHIEL.) Are there any other experiences of th kind?

A. We had another one with the East Side Auto Company which we paid for half of the tank. That is several years ago.

der to keep the customer we had to pay for half of the tank and e pump.

Q. You say in order to keep the customer. What were the repsentations?

A. The other companies were going to furnish them oil and furh a tank.

Q. Do you know what the companies were that would have furshed the oil?

A. The Standard Oil Company.

Q. That is the Standard Oil Company of Indiana?

A. Yes, sir.

Q. What other instances of that sort have you in mind?

A. There is one of the 13th Avenue Hardware Company. They t in a pump of the Sinclair Company in the same way.

Q. What were the facts about that?

A. They wanted us to put in a pump and we would not do it, and the Sinclair Company put in a pump in their place and sell them gasolene under one cent a gallon commission, one cent a llon profit.

Q. Are there any other instances that you recall?

A. No, I do not.

Q. That is the Sinclair Refining Company to which you refer?

A. Yes, sir; the Sinclair Refining Company.

Q. You say there are numerous instances similar to the three you ve enumerated?

A. I did not pay any particular attention to it. If I had known s was coming up I could have made notations of it.

Q. But it is a fact that there were numerous instances of the kind.

A. Yes, sir.

Q. (By Commissioner THOMPSON.) I want to read to you a paraaph from an affidavit of Seth C. Drake.

The ACTING CHAIRMAN. Who is Seth C. Drake?

Commissioner THOMPSON. He is one making an affidavit in supt of a motion of the Standard Oil Company of Indiana in Docket . 88.

The ACTING CHAIRMAN. What is his habitat? Where does he me from?

Commissioner THOMPSON. Chicago, Illinois. He is general sales nager for the Standard Oil Company of Indiana, a corporation. makes this statement in his affidavit which is filed in Docket No. as follows:

"Affiant further says that he has been connected with the sales artment of respondent for many years last past, and was so conted with it when the practice of loaning and leasing pumps and nks to customers was inaugurated, and said practice of leasing or ning pumps and tanks, for a nominal consideration, or free of rge, was inaugurated by the competitors of the respondent, and reafter adopted such practice merely as a matter of self defense meet in good faith the competition so tendered it by its com-

petitors; that such practice has been and is contrary to the judgm of the sales managers of respondent and is in their judgment b merchandising."

Do you agree with that statement, that it is bad merchandising give or lease at a nominal sum these pumps and tanks on condit that they will not sell the oil or gasolene of competitors?

A. Yes, I do.

104 Q. (By the ACTING CHAIRMAN.) I would like to ask y this: You are a dealer in lubricating oils?

A. Yes, sir.

Q. Do you confine yourself to lubricating oils and petrole products?

A. Yes, sir.

Q. Of course you have competitors in the sale of lubricating o that is, you have stiff competition, I take it?

A. Yes, sir.

Q. Have you ever had an instance where by reason of the i stallation of these pumps it set you out from the sale of lubricat oils?

A. No; I can not say we have.

Q. So in your case, so far as you have had occasion in the matte it does not follow that because a man has a pump, a free pump, h ties himself up to buy the lubricating oil of the man who sells h the gasolene?

A. No, sir.

Q. That has not been your experience?

A. No.

Q. (By Commissioner COLVER.) You solicit the sale of your l bricants just as freely when you see that one of these pumps a tanks are installed as you would if you did not see one?

A. Well, we do not. Sometimes it so happens that when th make a change they of course drop us on gasolene and they do n come back with the lubricating oil. But in a great many cases it does not make much difference. They will probably buy the gas lene from these people and buy lubricating oil from us, just t same.

Q. (By the ACTING CHAIRMAN.) What did you have in m when you answered the question that Mr. Thompson asked you, th you considered the giving of pumps as bad merchandising? Why it bad?

A. I feel that we can not afford to give pumps. We would n have the capital to put in those pumps. It takes an enormous amou of money to carry a supply of self-measuring pumps for custome

Q. Do you believe that the device really should be the property the man who operates it rather than the property of the man w has the commodity to sell and through which it is sold? Is th the way you feel about it?

A. Yes, sir; I do.

Q. (By Commissioner THOMPSON.) You think it cuts down competition in gasolene?

A. By owning your own tank?

Q. No; by having a tank which simply is given you for a nominal sum?

A. Yes, sir.

Q. (By the ACTING CHAIRMAN.) I wish you would explain why it cuts down competition.

A. For this reason, just as I explained before. I am not in position to sell a man gasolene if he comes to me and says, "Here, I am buying my gasolene from you and have to furnish me a tank and a pump." We have not got the money to keep these tanks and pumps, and it simply takes our business away from us; whereas, if that man buys his own outfit he could come to me anyway and say, "I want to buy some gasolene from you," and it would be all right. But on the other hand, we can not sell them any gasolene. I do not mean to say we can not sell them anything else.

Q. Then, taking that answer that you have just made with the former answer a few minutes ago, the device of the free pump in your opinion tends to reduce the number of competitors to only the strongest companies in the field, those who are enabled by reason of their capital to give the pump. Is that true?

A. Yes, sir.

Q. So, while it reduces the number of competitors, can it be said that it actually reduces competition if more than one man is given the pumps?

A. Yes, sir.

(Witness excused.)

Commissioner THOMPSON (addressing Mr. Osborn). Do you consider our jurisdiction?

Mr. OSBORN. No; I can not say that I am wholly agreed that you have jurisdiction of this entire subject. I do not mean to say that I am taking issue with you in your investigation into this matter or your inquiry into it, but it is a serious question in my mind whether this proposition, as it is handled, comes within the contemplation of the Clayton Act or of the Federal Trade Commission act.

The ACTING CHAIRMAN. We would like to hear you upon that proposition.

Mr. OSBORN. I will say this to you, gentlemen, that I do not know how long you expect to have these matters under consideration, but on that feature of it I would much prefer to submit it to you in the form of a brief, not necessarily a lengthy brief, but one that will set that proposition out. I have given you citations of authorities, and you might examine them and see, then, whether our views correspond or not.

Commissioner THOMPSON. How long will it take you to get that brief up?

Mr. OSBORN. I can give it to you within a week, if that will be time enough.

The ACTING CHAIRMAN. It does not have to be a lengthy brief.

Commissioner THOMPSON. We do not want a lengthy brief.

Mr. OSBORN. Just on this one feature of it?

Commissioner THOMPSON. Yes. As I understand you, you admit our jurisdiction to make the investigation but not our jurisdiction to enter an order?

Mr. OSBORN. If I take any issue with you it would be on that feature of it; yes, sir.

Commissioner THOMPSON. And your position here is that economically the method is sound?

Mr. OSBORN. No. I would not want to go on record as to that. There is a serious question in my mind on that subject.

(Informal discussion occurred which the reporter was directed not to record; after which the following proceedings took place:)

Commissioner THOMPSON. Do you want to introduce any evidence in addition to the stipulation?

Mr. OSBORN. No, I think not.

Are you through now with the Sinclair Refining Company's case or is there further evidence?

Mr. ZECHIEL. There will be further evidence on the economic question, along with all the rest of the cases.

Mr. OSBORN. You mean, along the line of the inquiry to-day?

Mr. ZECHIEL. Yes.

Mr. OSBORN. So long as there is any testimony to be introduced in the Sinclair case of course I expect to be here.

Mr. ZECHIEL. That will continue throughout the commission's case. The last witness may testify with respect to your company and with respect to the rest.

(After informal discussion, which the reporter was directed not to record, the commission adjourned, at 5.10 o'clock p. m., until to-morrow, Saturday, September 27, 1919, at ten o'clock a. m.)

107 Before the Federal Trade Commission.

FEDERAL TRADE COMMISSION *vs.* SINCLAIR REFINING COMPANY.	Docket No. 334.
FEDERAL TRADE COMMISSION *vs.* OKLAHOMA PRODUCING AND REFINING Corporation of America.	Docket 310.
FEDERAL TRADE COMMISSION *vs.* IOWA OIL COMPANY.	Docket No. 336.

FEDERAL TRADE COMMISSION *vs.* L. SMITH OIL AND GASOLENE COMPANY.	Docket No. 314.
FEDERAL TRADE COMMISSION *vs.* BARTLES OIL COMPANY.	Docket No. 332.
FEDERAL TRADE COMMISSION *vs.* RICHARDSON LUBRICATING CO.	Docket No. 330.

Second day.

CONFERENCE ROOM, FEDERAL TRADE COMMISSION,
Washington, D. C., Saturday, September 27, 1919.

The hearing was resumed, pursuant to adjournment, at ten o'clock a. m.

Present: Commissioners Murdock (acting chairman) and Thompson.

Present, also: Mr. Chester L. Zechiel and Mr. Joseph H. Burdeau.

Proceedings.

Mr. ZECHIEL. Mr. Cordell is called in all the cases, in the cases of all the respondents, with no exceptions.

O. L. CORDELL was thereupon called as a witness by and on behalf of the Federal Trade Commission, and being first duly sworn, testified as follows:

Direct examination:

Q. (By Mr. ZECHIEL.) Where is your residence, Mr. Cordell?

A. Oklahoma City, Oklahoma.

Q. With what concern are you connected there?

A. Sloan-Cordell Oil Company.

Q. What is the business of that company?

A. They are oil and gasolene jobbers and retailers.

Q. Over what territory geographically does your company do business?

A. Just in Oklahoma City, in gasolene. We ship a little lubricating oil over the State.

Q. Do you do any business outside of the State of Oklahoma?

A. No, sir.

Q. That is true of both your lubricating business and your gasolene business?

A. Yes, sir.

Q. In conducting your business in wholesale gasolene and lubricating oils do you conduct the business also of leasing or loaning or selling oil or gasolene pumps and tank equipment?

A. We loan gasolene equipment.

Q. You do not sell any of it to any of your customers?

A. We do not make a business of it. We sell an equipment once in a while when we have an opportunity to. We are always glad to sell some of the old ones we have.

Q. Where do you obtain your pump equipments?

A. That we have is bought from Bowser and Wayne. All we have loaned out—is that what you are speaking of?

Q. What you have loaned or any you have sold.

A. That is all—Bowser and Wayne.

Q. Where are those companies located?

Q. (By the ACTING CHAIRMAN.) I do not thing that is perfectly plain. It is not to me. You both loan pumps and buy them and sell them again?

A. That is not what I intended to convey. We have filling stations or retail gasolene stations that we operate ourselves. Of course we buy pumps for those, as those are our own property. Then we have equipment that we buy and loan to garages and other people who buy gasolene for resale. We are not in the business of selling pumps and equipment at all. Once in a while we have an opportunity to sell one and we do. We do not make that any part of our business.

Q. Whether you give or whether you buy them for your own use at a filling station, you buy them from the Wayne people and Bowser?

A. We have some that we buy from Tokheim. I think that would cover all we have.

Q. (By Mr. ZECHIEL.) Where are the Wayne and Bowser concerns located?

A. I think their home office is Fort Wayne, Indiana; both of them.

Q. And the Tokheim Company to which you refer is located where?

A. We do business through the Hayes Equipment Company, of Wichita, Kansas.

Q. Do you know where the Tokheim Company is located?

A. I understand it is also at Fort Wayne. I am not positive.

Q. When you buy these pumps from either of these companies do you have them sent to you in carload lots?

A. No, sir.

Q. How are they shipped?

A. Local shipments.

Q. Do you order a pump for a particular customer?

A. We have done that.

Q. In cases where you order a pump for a particular customer, is it billed to you directly or to the customer?

A. No, sir.

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Q. When you receive it consigned to you it is received with the intention of immediately placing it to one particular customer; is that true?

A. Sometimes.

Q. These pumps you receive on your own consignment—do you send them out to the customers to whom they are ordered or for whom you have procured them in the same package in which you have received them from the companies who manufacture them and from whom you purchased them?

A. I am not sure about that. I suppose sometimes probably we crate them before we take them out.

Q. Let me get that clear. Pumps that come in you have consigned to you. Are they stored then in a warehouse?

A. No, sir; they are shipped direct to us and taken to our warehouse or direct to the place where they are going to use it.

Q. Many times they are tak'n dir'ctly from the railroad station and freight yards to the customer to whom you have leased or loaned them or sold them?

A. We have done that.

Q. When you store them in your own warehouse you just store them in the same crate in which they are shipped from the vendor?

A. Yes, sir.

Q. When you get ready to place one of these pumps with the customer you just take it out of your warehouse as it was shipped, and place it with the customer?

A. Yes, sir. May I make a little statement in regard to that?

Q. Yes.

A. We bought all of the equipment we have in 1917. At that time I think most of it was taken direct from the depot to the place we were going to use it. When we bought about fifteen or sixteen outfits we discontinued the practice; that is, we discontinued it as far as any new business was concerned. We would not buy any more equipment. If all of the equipment we had was in use and we had an opportunity or request from some one to place some gasolene equipment, we would turn it down. We discontinued the practice of buying any more equipment to loan.

Q. That is what I was going to ask you. You mean that to refer only to loans of equipment. It is a fact that even now you would buy a tank and sell it to a customer of yours?

A. We do not have any opportunity whatever to do anything like that, because all of these pump companies I have named have local representatives.

Q. The pumps which you have loaned to your various customers—under what conditions or agreements or understandings were those loans made, or leases if there were leases?

A. That the gasolene stored in the equipment and sold through it was to be our gasolene.

Q. What was the consideration, if any, that was given for the use of these tanks and their equipment?

A. None whatever. The business——

Q. Nothing but the agreement to use in connection with the particular pumps and tanks your own gasolene products?

A. Yes, sir.

Q. In that connection did you also require the customers to purchase lubricating oils through your company?

A. That was not a consideration. However, it was generally understood that we should have their lubricating-oil business.

Q. Was it understood between you and your customers that they were to buy all of their gasolene from your company?

A. It was.

Q. As a matter of fact, did you have any of these pumps installed with any customers who buy gasolene from some competitor of yours in the gasolene business?

A. That has happened. It is not supposed to happen. We would not put the equipment in for somebody else to use, of course, naturally; but once in a while it happens.

Q. Do any of these customers of yours who have your loaned outfits have more than one such equipment?

A. I do not think they have at this time. They have had, though.

Q. In how many cases was that true?

A. In one case there were two companies furnishing the same party, and both had an equipment in there.

Q. (By Commissioner THOMPSON.) Did that continue very long?

A. It continued something over a year, I think; about a year probably.

Q. With the consent of the two companies that were furnishing the equipment?

A. There was no agreement between the two oil companies at all.

Q. (By the ACTING CHAIRMAN.) But each consented to give the pump?

112 A. I presume the other company did. We consented to let the pump.

Q. (By Mr. ZECHIEL.) What was the occasion of the termination—did I interfere with your answer?

The ACTING CHAIRMAN. No, sir. I wanted the circumstances if I could.

Q. (By Mr. ZECHIEL.) What were the circumstances that terminated that arrangement?

A. The other company changed hands and we saw an opportunity to get all the business. The party did not like the policy of the company—the new company—so he had the other one taken out.

Q. Who was this other company before it changed hands?

A. I think it was the Doty Oil Supply Company. It went out of business.

Q. To whom did they sell their business?

A. They sold part of it to the Atwood Refining Company.

Q. How many such loan agreements have you in the section where ou sell your product?

A. At this time we have about twelve outfits loaned.

Q. How many have you had in the past two or three years?

A. Never more than fourteen or fifteen.

Q. Who are your competitors in the Oklahoma territory?

A. In Oklahoma City? You want all of them?

Q. Yes.

A. The Pierce Oil Corporation, The Magnolia Petroleum Company, The Texas Company, the Crew-Levick, the National Refining Company, the Consumer's Refining Company, the Crown Petroleum Company, the Atwood Refining Company, the Home Petroleum Company, Klein Oil Company, and the A. W. Lee. That is all I can think of.

Q. Does the Oklahoma Producing and Refining Corporation of American control any company as a competitor of yours, or is it itself a competitor of yours?

A. It controls the Crown Petroleum Company. That company is its marketing company.

Q. So that all business that the Oklahoma Producing and Refining Corporation of America does in that territory is done through its marketer—what did you say the name of it was?

A. The Crown Petroleum Company.

Q. That is a fact, is it not?

A. Yes, sir.

Q. Who of your competitors lease and loan oil tanks and pumps for a nominal consideration under tying agreements?

A. I do not know that I can say that positively.

Q. Any that you know of to your own knowledge?

A. I do not know what kind of agreements they have or anything about that.

Q. You do not know any of the agreements?

A. I do not know it of my own knowledge.

Q. Do you know of your own knowledge whether any of these competitors do lease and loan pumps similarly to the practice you have of leasing and loaning pumps?

A. I have always thought they did and have been told they did. I am sure they used to, but I think the larger companies have been discontinuing that practice as fast as they could for some time.

Q. For some time since when?

A. I think in the last two or three years.

Q. Does the Oklahoma Producing and Refining Corporation of America, or its marketing company or subsidiary, lease pumps under similar agreement to yours?

A. I know of only one instance, and I only know that through that the customers have told me.

Q. How long have you been connected with your company?

A. I have been with this company about two years.

Q. What has been your experience prior to your present connection with the oil and gasolene business?

A. I was in the refining and marketing business for ten years.

Q. In the course of your business with the present company or your previous experience did you have occasion to come in contact with garages and retailers frequently?

A. Personally?

Q. Yes, more or less personal contact.

A. Not in my former position, but since I have been in this business I have.

Q. What has been your experience as to whether or not generally, not only with respect to your customers but with respect to all garage people and retailers generally with whom you have come in
114 contact, the garages and retailers generally have more than one gasolene tank and pump outfit at the same time?

A. They do not down in our country.

Q. Is that the general rule or is that almost the universal rule?

A. That is practically universal.

Q. Also from your experience, is it a fact that the garage people and retailers generally do not buy and sell gasolene products of another company than that which has the oil tank and pump installed?

A. That is the general rule.

Q. How general is that rule?

A. Well, it is universal as regards gasolene. As to lubricating oils, lots of them buy their lubricating oils other than from those from which they buy their gasolene.

Q. Is it a fact that the effect of these contracts is to cause retailers to purchase their lubricating oils from the same company who lets them the pump?

A. As a general rule that is true, I think.

Q. (By the ACTING CHAIRMAN.) That is, as I caught this answer in connection with the other answer you have given previously, while in your case there is no understanding, or, at least, contract, that because you furnish a man with a free pump and sell him his gasolene to be used only through that pump, that he shall also buy his lubricating oil, but it naturally follows that he does buy his lubricating oil; is not that true?

A. As a general rule; and we feel that he should.

Q. (By Commissioner THOMPSON.) Do you consider this giving away at a nominal price of tanks and pumps for a consideration that the purchaser will not use them for anybody else's oil but yours a good practice in business?

A. No. I do not. I do not consider it good practice.

Q. Would you like to see it done away with?

A. If it could be done away with so it would not injure the small men in business, like our company, I would like to see it discontinued.

Q. (By Mr. ZECHIEL.) Why do you think it is not a good business practice?

A. Simply because you have a large investment there. It is deteriorating all the time. If no one had them, you would have the same opportunity to get that business.

Q. (By Commissioner THOMPSON.) Competition would be freer?

A. I do not know that it would be any freer than it is now. It probably would be somewhat, but I do not think we would get a bit more business, or any other company would; but we would all get business without the investment.

Q. (By the ACTING CHAIRMAN.) Is it common in your line of business to make a better margin on lubricating oil than on gasolene?

A. Yes, sir.

Q. Would you go so far as to say that in a given station the profits on lubricating oils carry the stations?

A. Ours do not. I will say that our lubricating oils will pay seventy-five per cent of the expense—probably ninety per cent of the actual running expenses of the station, not including only overhead.

Q. (By Mr. ZECHIEL.) I want to go back to the answer you made a moment ago, in which you said, in substance, that you did not think competition would be freer, and that in your opinion you did not believe you would have any more business if this practice were done away with. Am I correct about that?

A. Something like that; I do not remember exactly.

Q. Do you mean to say that if you did not have to furnish the oil tanks and pumps to your customers you could not compete more readily with the larger companies who have very much larger capital to invest in this sort of practice?

A. Here is the situation: The larger companies are installing their own filling stations as fast as they can find locations. That necessitates larger investment. The small concern cannot do that on anything like as large a scale as the big companies do, and it seems in our part of the country that the larger concerns, particularly, some of them, are not trying to get this garage business. They are not trying to get any business where the gasolene is sold to be resold. They are trying to get all of the business they can through their own stations. As I see it, that is the end toward which they are all working, to market their gasolene direct to the consumer, cutting out the middleman, and thereby, in the course of time, cutting out the independent jobber.

Q. Is it not a fact, however, that there is a very large demand still for garage service in gasolene and lubricants?

A. There is a good demand, but in the larger cities it is growing less all the time.

Q. Is it not your opinion, however, that there must be a demand for service in a garage where numerous cars are stored and from which owners depart in the morning?

A. For the actual cars stored in the garage, yes, sir; not for a transient trade.

Q. And also if there were a differential between the marketi price from the large service stations and the tank wagon price y refer to, is not that really back of the difficulty in the garage m running his business from his own equipment?

A. I do not believe I understand that question.

Q. You say that the garage man can not compete with the ser ice station generally. Is that true?

A. I mean to say that they do not compete.

Q. Why is that true?

A. I do not know exactly why it is, but the average garage m does not want to handle gasolene, particularly the smaller on They all say it is a nuisance. They claim they lose money on that they handle gasolene only for the convenience of their c tomers. I do not know why it would be, unless it is because th business is small. Take it in Oklahoma City, I will venture say that the largest garage in town does not sell over one hundr and twenty-five gallons of gasolene a day.

Q. Then it is your opinion that the individual pumps, the cur stone pumps used by garage people and grocery stores and vario other places where curbstone pumps are being used, will decli to a margin where independent jobbers will be crowded out of t business?

A. I think they will, if they do not put in filling stations—in t larger cities, now, I am speaking of.

Q. (By the ACTING CHAIRMAN.) I would like to get that clear in my mind, this evolution from the old pump to the filling stati Take a given route that you have in mind, a daily trip in Okl homa City, not on your part, because you are a dealer in gasole but take the average citizen. He starts down town in the morni from his private garage which, in Oklahoma City, used to be barn, and as he comes down the street he can buy gasolene at s eral places. He might drop in a garage nearby, or he might stop front of a little grocery store that has a pump, or he may go to filling station. Is it your idea that because of the service given a filling station, the fact that a man is on hand instantly, th there is a driveway, a place for the car and some regularit
117 about it, that is liable to induce the citizen who has to co down in the morning to go to the filling station rather th to stop over at the grocery store or the garage?

A. That is certainly true. He would go to the filling station eve time if he had enough gasolene in his tank to get there.

Q. (By Commissioner THOMPSON.) Do you have any filling st tions?

A. We have four that we operate ourselves.

Q. How long have you been running them?

A. One of them for a little over two years, and the others for year or eighteen months.

Q. Have you had them long enough to have an opportunity to study the cost of your investment, the overhead, and interest on your money in the investment?

A. Yes, sir, we have, although the last station we put in has never gotten up to where we think it ought to be, or anything like it.

Q. Does it seem to be a more profitable method than the other?

A. It is not any more profitable, no. The fact of the matter is that you can make more money in your tank wagon business than you can in your filling station business. We would not have them if he did not have to have them.

Q. Is not that likely to be somewhat of a deterrent to the putting in of the filling-station system?

A. It does not seem to be in Oklahoma City. They have them there. I will venture to say about three times as many as we need, anyway, in all parts of the city. You do not have to drive very far in any part of the city to find a gasolene station operated by some oil or gasolene company there.

Q. (By Mr. ZECHIEL.) Do you not find, however, that the leasing and loaning of gasolene pumps often, under the competition in which you are engaged, leads to abuse of that system; that you have customers requiring you to furnish gasolene pumps where you are forced to do so, although you do not make an economical investment?

A. That is not true in our case, because if we do not consider it a good investment we do not put it in.

Mr. ZECHIEL. That is all.

Q. (By the ACTING CHAIRMAN.) I would like to ask, Mr. Cordell, this: Take this Company establishing a filling station on the one hand, and a jobbing company selling gasolene on the other through pumps; in a contest between the two just what permanent advantage is given the man who has merely the pump over his competitor who has the filling station, if the man with the pump is given the privilege of giving it away to the retailer? Where is his advantage in that proposition in a permanent contest?

A. I do not see that he has any.

Q. Then would you say that there is no advantage in the long run in the privilege of giving away a pump to a retailer?

A. I would not say that unless the policy and marketing conditions of the business change. There is an advantage at this time. One of the greatest advantages to the loaning of pumps, in my estimation, is that after you once get a piece of business for your product, and your treatment satisfies your customer, you do not have to spend time and money seeing that fellow to hold his business, losing it and getting it back again. You have got it. The other companies, as a general rule, are theirs, and I think, as far as actual values are concerned, the business is pretty well divided up. I do not know that any company could have any more.

Q. (By Commissioner THOMPSON.) It does, then, from your statement restrict competition, does it not?

A. To that extent it does.

Q. (By Mr. ZECHIEL.) What induced you to change your polic from leasing and loaning pumps and owning service stations?

A. We did not change our policy. We had filling stations, the firs thing we did. We also loaned pumps at the same time.

Q. If you consider the leasing and loaning an advantage, I do no quite grasp why you have the filling stations also.

A. We want all the business we can get, both ways. There are som customers to whom we cannot sell through tank wagons. We ca sell through filling stations.

Mr. ZECHIEL. That is all.

The ACTING CHAIRMAN. Does anyone want to cross-examine thi witness?

(No response.)

(Witness excused.)

119 ROBERT S. COLWELL was called as a witness by and on behal of the Federal Trade Commission, and, being first duly swor testified as follows:

Direct examination:

Q. (By Mr. ZECHIEL.) Where is your home?

A. Fort Wayne, Indiana.

Q. With whom are you connected there?

A. S. F. Bowser Company.

Q. What is the business of that company?

A. The manufacture and sale of oil pumps and tanks.

Q. What is your connection with that concern?

A. Assistant general sales manager.

Q. In your position as assistant general sales manager state more detail what you have charge of?

A. I have the direction of the sales in the eastern part of th United States.

Q. In the eastern part of the United States?

A. Yes, sir.

Q. Just what does that mean—east of the Mississippi?

A. No; east of Ohio.

Q. Are you acquainted with the distribution of your products the western part of the United States, in the central part, rather?

A. I am, yes, for this reason, that all of the orders in the Unite States, except from the Pacific Coast States, pass through my offic as a matter of convenience; so that I am right in touch with the orders.

Q. What is the general geographical territory over which yo company does business?

A. You might put it the whole world—all of the United States an Canada and the principal foreign countries.

Q. I think I asked the business of your company, did I not?

A. Yes, sir.

Q. Are you acquainted with the method by which your business is carried on? I mean as to the manner in which your product is shipped?

A. Generally, yes.

Q. How is that done?

A. It is shipped on orders individually. It may be a unit shipment or a carload.

Q. Both unit and carload shipments?

A. Yes, sir.

Q. I want to ask you in particular whether your company engages in the sale and distribution of these oil tanks and pumps in the State of Oklahoma?

A. Yes, sir.

Q. And in the State of Oklahoma, in the city of Oklahoma City?

A. Yes, sir.

Q. You cover that whole State generally in your business?

A. Yes, sir.

Q. When you receive orders from various oil companies or other companies down there, how are the goods sent to them?

A. Of course we would vary according to the individual case, but generally to the oil companies. Sometimes direct to a customer or an individual they designate.

Q. How are your sales made—through agents?

A. Yes, sir.

Q. What other way? Describe in a general way the system you have of conducting your business.

A. It has direct controlled sales forces who devote their entire time to our business.

Q. How many of such salesmen do you have in this way in that territory, in the central States generally?

A. We probably have a hundred and fifty men.

Q. Are those men engaged exclusively in the sale of your products?

A. Yes, sir.

Q. Does your company sell your products in central Missouri?

A. Yes, sir.

Q. (By Commissioner THOMPSON.) What is the name of the company?

A. S. F. Bowser Company.

Q. (By Mr. ZECHIEL.) What is the general extent of the business you do in the whole of that central States area, in a general way, in the number of pumps and also in value per year?

A. I can not give it to you in pumps, but I can give it to you approximately in orders. They probably run twenty thousand orders in that vicinity a year.

Q. You are talking about the Central States generally, from Canada south to the Gulf?

A. Yes; in the central part of the country?

Q. Yes.

A. Yes.

Q. (By the ACTING CHAIRMAN.) What does a pump sell for?

A. That would depend on the equipment. It runs from about a hundred dollars to five hundred dollars——

Q. (By Commissioner THOMPSON.) That includes the tank?

A. (Continuing.) Between one hundred and a thousand dollars would be more accurate.

Q. (By the ACTING CHAIRMAN.) What would be more accurate?

A. From one hundred to a thousand dollars an outfit. The pumps would sell all the way from twenty-five dollars up to four hundred and fifty dollars, and the difference there would be the capacity of the tank and the material.

Q. Where are they made?

A. Fort Wayne, Indiana.

Q. The actual manufacturing?

A. Yes.

Q. Both tank and pump?

A. Yes, sir. We manufacture all of our own equipment.

Q. When did you start?

A. 1885 the company started.

Q. What did you pump first through these pumps?

A. Kerosene oil, a self-measuring pump for grocery stores, the old goose neck type of pump.

Q. They have always been red?

A. No. That has been the fact for the last eight or nine years.

Q. (By Mr. ZECHIEL.) I wanted to ask you more particularly about these orders. You named the number of orders. What do you mean when you say orders?

A. It might mean more than one pump; it might mean a dozen or fifty.

Q. Would it ever mean less than a pump, or pumping outfit?

A. It might when it was for a tank only, for instance.

Q. Would you say there had been at least as many pumps sold in that general geographical territory as there were orders?

122 A. Yes, sir; absolutely.

Mr. ZECHIEL. I think that is all.

Q. (By the ACTING CHAIRMAN.) About what time did you go into the gasolene pump business? When did the pump begin to be used for gasolene?

A. About 1904, is when it began to be a big thing.

Q. That was coincidently with the appearance of the automobile?

A. Yes, sir.

Q. Then how long, if you can tell me, did it run along before competition reached the stage when the method of leasing for a nominal sum began?

A. I think that has only been in the last four or five years, if that long. It has been comparatively recent, as far as I know.

Q. Would it be possible for you to say whether or not the device of giving away or leasing for a nominal sum appeared simultaneously with the introduction of the filling station?

A. No: I think it preceded it.

Q. The giving away preceded that?

A. Yes, sir: that is my opinion.

Q. (By Commissioner THOMPSON.) I presume there is no way of your telling whether that practice has increased the number of orders you get?

A. No, I think not.

The ACTING CHAIRMAN. What do you expect to show by this witness?

Mr. ZECHIEL. Jurisdiction only, Mr. Murdock.

The ACTING CHAIRMAN. He does not know anything about the economic situation at all.

Mr. ZECHIEL. And nobody from Bowser's headquarters knows. The only way I could get that evidence would be to call one hundred and twenty-four agents. I would have to call those agents particularly to get that evidence. I think we have probably got it through the oil company witnesses.

Q. (By the ACTING CHAIRMAN.) I would like to ask this question as a trade matter:

In manufacturing pumps do you manufacture them always for Bowser, or will you manufacture for other sellers of gasolene if they desire? Suppose the Sinclair Oil Company came to you and wanted pumps. Would you manufacture them for the Sinclair Oil Company?

A. Our business, you know, is only the equipment. We do not sell any gasolene or oil.

Q. I know that is true.

A. But we do business with the Sinclair people.

Q. And do manufacture for them?

A. Only under our own name.

Q. That is what I wanted to know.

A. No: we never manufacture with any label but the Bowser label.

Q. You manufacture a pump for the Sinclair Company as a Bowser pump but carrying above the pump this Sinclair sign?

A. We have done that. We do that right along—finish it in what we call, in that case, the Sinclair finish.

Q. You are just interested in the sale of pumps?

A. Yes, sir.

Q. (By Mr. ZECHIEL.) When you say you finish it in the Sinclair finish, just exactly what does that mean?

A. That means, in their case, a green pump with a white top, and some——

Q. That portion above the ground?

A. Yes, sir. The pedestal would be green—I think that is their trade-mark color—and the top part is white, which is another one of

their colors, and gold striping, and then the Sinclair trade-ma name on there.

Q. (By the ACTING CHAIRMAN.) On the lamp? I think I have s that.

A. I do not think the Sinclair people use a lamp. Some of t other companies do.

Commissioner THOMPSON. Does anybody care to cross-examine t witness?

(No response.)

(Witness excused.)

Mr. ZECHIEL. These are all the witnesses we have to-day. None the others have appeared.

The ACTING CHAIRMAN. Are you through now?

Mr. ZECHIEL. For to-day. There will be other witnesses on M day.

(Whereupon, at 11.30 o'clock a. m., the commission adjourned un Monday, September 29, 1919, at ten o'clock a. m.)

124 Copy No. 3.

Before the Federal Trade Commission.

FEDERAL TRADE COMMISSION *vs.* SINCLAIR REFINING COMPANY.	Docket No. 334.
FEDERAL TRADE COMMISSION *vs.* OKLAHOMA PRODUCING & REFINING CORPORATION of America.	Docket No. 310.
FEDERAL TRADE COMMISSION *vs.* IOWA OIL COMPANY.	Docket No. 336.
FEDERAL TRADE COMMISSION *vs.* C. L. SMITH OIL AND GASOLENE COMPANY.	Docket No. 314.
FEDERAL TRADE COMMISSION *vs.* BARTLES OIL COMPANY.	Docket No. 332.
FEDERAL TRADE COMMISSION *vs.* RICHARDSON LUBRICATING CO.	Docket No. 330.

Washington, D. C., September 29, 1919. Hulse & Allen, Offici Reporters, Whitford Bldg., Washington, D. C.

125 Before the Federal Trade Commission.

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FEDERAL TRADE COMMISSION *vs.* BARTLES OIL COMPANY.	Docket No. 332.
FEDERAL TRADE COMMISSION *vs.* RICHARDSON LUBRICATING CO.	Docket No. 330.

Third day.

CONFERENCE ROOM, FEDERAL TRADE COMMISSION,
Washington, D. C., Monday, September 29, 1919.

The hearing was resumed, pursuant to adjournment, at ten o'clock a. m.

Present: Commissioners Murdock (acting chairman), Thompson, and Colver.

Present, also: Mr. Chester L. Zechiel, attorney-examiner, and Mr. Joseph Burdeau, attorney-examiner.

Appearance: As previously noted.

126 *Proceedings.*

Mr. ZECHIEL. There was a misunderstanding, Mr. Thompson. Messrs. White and Case filed an answer for the Oklahoma Producing and Refining Corporation of America. They also acknowledge receipt of the notice of the date set for the hearing on the 26th. They did not appear. Mr. King appeared for his company, but was not of record.

Commissioner THOMPSON. Is that the company you are now referring to?

Mr. ZECHIEL. Yes, sir: the Oklahoma Producing and Refining Corporation of America. He did not know anything about the fact that White and Case had been retained from New York, and therefore did not appear on the 26th. He is here this morning, however.

Commissioner THOMPSON. Is Mr. King of counsel, or is he a representative of the company?

Mr. ZECHIEL. He is the attorney for—is it a subsidiary company or the operating company?

Mr. KING. The operating company.

Mr. ZECHIEL. But not of the Oklahoma Producing and Refining Corporation of America, who are respondents.

Commissioner THOMPSON. They have not answered the subpoena?

Mr. ZECHIEL. Mr. White, of New York, returned the notice duly signed as having been accepted, but he did not appear before the commission. I want to ask that this case be continued and that the evidence be concluded for the commission later on, perhaps in the latter part of October, to be taken probably in Nashville, Tennessee, or down there somewhere; my reason being that so far as the commission is concerned there are several witnesses, including the Texas Company and one or two other companies, who operate in his territory, and those witnesses will not be here. There will be a hearing at that time for the Kentucky Company and the Texas Company and the Kentucky Independent Company and, I think, one or two other companies in that southwest territory, in that general territory. The Oklahoma Producing and Refining Corporation of America are not immediate competitors, so far as the retailers are concerned, with the Standard Oil people, and therefore are not necessarily involved in this proceeding.

Commissioner THOMPSON. All right.

Mr. ZECHIEL. I will call Mr. Drake.

127 SETH C. DRAKE was called as a witness by and on behalf of the Federal Trade Commission, and, being first duly sworn, testified as follows:

Direct examination:

Q. (By Mr. ZECHIEL.) Mr. Drake, with what company are you associated?

A. The Standard Oil Company of Indiana.

Q. How long have you been with that company?

A. About twenty-three years.

Q. Did you have any experience generally in the oil industry prior to your association with that company?

A. About ten years previous to that.

Q. During the ten years previous to your association with the Standard Oil Company of Indiana, with what company were you associated?

A. The Consolidated Tank Line Company.

Q. What were your general duties during the time of your employment, the ten years prior to your association with the Standard Oil Company of Indiana?

A. In the marketing department, working as salesman and as assistant to managers of the marketing department.

Q. Over what territory, geographically, in a general way, were your duties during those ten years?

A. In Kansas, Missouri, Iowa, South Dakota, and Nebraska.

Q. Since you have been employed by the Standard of Indiana, what have been your duties, in a general way?

A. In the marketing department in the middle western territory.

Q. What is your present position in that company?

A. General manager of the sales department.

Q. How long have you been general manager?

A. Four years and a half.

Q. Prior to that time what was your official position?

A. I was manager.

Q. While you were manager of the company, what was the general geographical territory over which you were manager?

A. Part of the time at Indianapolis, part at Dubuque, Iowa, part at Sioux City, Iowa, and at St. Joe, Missouri.

Q. Since you have been general manager of the Standard Oil Company of Indiana what has been the territory over which you have had supervision?

A. Indiana, Michigan, Illinois, Wisconsin, Iowa, Minnesota, North and South Dakota, Kansas, and Missouri.

Q. You are acquainted with the general method of business conducted by that company?

A. In the sales department, yes, sir.

Q. What is the general business in which your company is engaged?

A. In the manufacture and sale of petroleum and its products.

Q. Do you sell oil in all the territory over which you have geographical jurisdiction?

A. We do.

Q. How do you get this product, the oil and gasolene?

A. It is manufactured at the refineries.

Q. Prior to the time it reaches the refineries where is your general source of supply?

A. We buy the most of it from the Perry Pipe Line Company.

Q. From what territory does that pipe line extend?

A. From the southwestern fields.

Q. Including, generally, what States?

A. Kansas, Oklahoma, and what is known as the southwestern field.

Q. Where are your refineries located?

A. Whiting, Indiana; Wood River, Illinois, and Sugar Creek, Missouri.

Q. After your crude oil is brought in by the pipe lines to your refineries, what is the general disposition of the product that you refine, geographically?

A. It is made into the various products at these refineries and then sold through these States which I named. Is that what you mean?

Q. That is what I am getting at, yes. You do a wholesale business generally throughout these States?

A. Yes, sir.

Q. In connection with your gasolene business and oil business generally, do you buy and sell gasolene and oil pumps and tanks?

A. We do.

Q. In all the territory over which you operate, generally?

A. Yes.

129 Q. Where do you purchase these pumps and tanks?

A. Gilbert and Parker Company.

Q. Where is that concern located?

A. Springfield, Massachusetts.

Q. How do you have these pumps shipped to you in your territory?

A. They are crated and loaded into cars and shipped to us in carload lots to various distributing points in different states.

Q. How do you order these pumps from the Massachusetts company in a general way?

A. In carload lots, as a rule.

Q. I meant rather preliminary to that. What are the negotiations that lead up to the purchase of these pumps? Do you file an application or send in an order or fill out an order blank?

A. We send them an order for a certain number of these pumps or tanks.

Q. To be delivered at any particular place?

A. To be shipped to some point in our field; yes.

Q. As a result of that order are those pumps shipped to these various points of yours in the various states?

A. Yes.

Q. What happens to the pumps when they arrive at these various points in your territory?

A. They are unloaded from the car and put into a warehouse.

Q. Whose warehouse?

A. The warehouse of the Standard Oil Company of Indiana.

Q. From there what happens to these pumps?

A. They are sold and leased to various customers.

Q. When you sell or lease these pumps and distribute them to your various customers, do you sell or lease the same in the original crate in which they are shipped into this warehouse?

A. We do.

Q. Mr. Drake, in your experience in this territory generally, do you come in contact with the various garages and retailers generally to whom you sell your product?

A. We do.

Q. I am asking you personally, now.

A. No, sir; not personally I do not.

Q. During your past experience, which has been about thirty-three years, has it not?

A. Yes, sir.

Q. (Continuing.) Have you come in contact with the individual garages and retailers?

A. I have.

Q. From your experience in that connection do you know as a matter of fact whether or not garages and retailers generally use more than one gasolene pump in the general distribution of the product or resale?

A. They do.

Q. See if I am clear about that. Here is John Smith, we will say, living at a town in Illinois. He is a garage man. Does he have more than one gasolene pump and tank from which he sells gasoline?

A. Oftentimes they have two; yes.

Q. They have more than two, frequently, or not?

A. No; there are a great many that have two, but I do not recall any that have any more than two.

Q. (By Commissioner THOMPSON.) Do they have two on the same premises?

A. Yes, sir; oftentimes.

Q. Why do they have two?

A. Sometimes one at the curb for supplying people that go by, and then another one inside, sometimes two inside, if they are a very large garage, to supply the people who keep cars in the garage.

Q. Have you ever known of an instance where, having, for example, the pump of the Standard Oil Company of Indiana, they would have the pump of another competitor on the premises?

A. I have known of those cases.

Q. Many?

A. No, sir.

Q. Would you say very few?

A. I have known of a few.

Q. How many can you recall?

A. Well, I could not name any specific number, but I have known of a number. I should say I have heard in the last few years of probably twenty-five or thirty cases of that kind, that I have personally heard of.

Q. That covers your entire field?

A. In a general way. Of course there may be many of those things that I would not hear of.

Q. But you would say that as a rule that situation does not exist?

A. Well, I have known of a number of cases of it. I do not exactly understand——

Q. It has been testified here by a number of witnesses that in practically all cases—perhaps there may have been an exception in one or two instances—where a man is given for a nominal sum a pump and tank by one company, no competitor gets a pump or tank in on the premises while the pump and tank of the original party is on the premises; and I was wondering if your experience agrees with that?

A. Of course, in most cases they only have one pump, and that will be loaned by somebody, and of course there would not be anybody else's gas handled as a rule, but in many cases they do have two tanks and pumps and handle two different kinds of gasolene.

Q. And have the gasolene of more than one competitor go through the pump, or through a pump?

A. Oh, yes. Many garages buy gasolene of two or three different companies. Is that what you mean?

Q. Yes.

A. Yes, sir. They buy from us one week, of some other company next week, and another company a week after.

Q. You did have a contract, did you not, with them, when you gave a pump for a nominal sum, and you retained the exclusive right to have only your gasolene go through that pump?

A. In many cases they bought of us exclusively.

Q. And where they bought of you exclusively, then they could not use some one else's pump. Is that correct?

A. We do not restrict them from putting in some one else's pump and tank. They could put in some one else's pump and tank.

Q. But you did restrict them from using anyone else's oil and putting it through your pump?

A. I do not think the contract read that way. I do not think it insisted that they should put no one else's gasolene into this pump.

Q. That was my recollection of your contract. I may be wrong about it.

Q. (By Mr. Zechiel.) It is a fact, is it not, Mr. Drake, that your contract provides that no gasolene of a competing company or any other oil company shall be used in connection with any pump or tank that you lease to a customer?

132 A. I do not understand that they could not put in other gasolene into the tank.

Commissioner Thompson. May I ask if there is already on record a stipulation to that effect?

Mr. Zechiel. Yes, sir; there is.

Commissioner Thompson. The Standard Oil Company of Indiana has stipulated that to be the fact?

Mr. Zechiel. That is true.

I will reserve the right—I do not know whether I will care to do so later on and interrogate on it—to offer in evidence the stipulation of the Standard Oil Company of Indiana, or that portion referring to the contract.

Commissioner THOMPSON. I suggest that you bring the stipulation here and have the witness look at it and then ask him to refresh his memory.

Mr. ZECHIEL. The witness has a copy of that stipulation. [After referring to a paper.] I do not believe you have a copy of the contract, have you?

The WITNESS. No.

Q. (By Mr. ZECHIEL.) In connection with your handling of pumps and tanks, Mr. Drake, did you lease and loan these pumps and tanks to various customers?

A. We did.

Q. What were the general conditions under which these pumps and tanks were leased and loaned, if you remember them?

A. At a nominal sum, prior to July 1st.

Q. Don you recall now, having thought it over, whether or not in addition to their being charged only a nominal sum, there was a restriction as to the use that should be made of these pumps, whether they should be used to handle gasolene of a competitor or not?

A. No, I do not; I do not recall.

Q. Are you acquainted with the fact that a complaint was brought against your company by the Federal Trade Commission?

A. Yes, sir.

Q. Something more than a year or two ago?

A. Yes, sir.

Q. Do you know the general nature of that complaint?

A. With reference to leasing and loaning pumps and tanks?

Q. Yes, sir.

A. Yes, sir.

Q. What was the general charge in that respect?

A. The charge, as I understand, was that we were leasing and loaning these tanks and pumps at a nominal sum and it was working a hardship on competitive companies that were not able to lease and loan pumps and tanks in the same way.

Q. What was the outcome of that proceeding?

A. We discontinued it——

Q. I mean, the outcome of the proceeding itself. Was there ever an order issued against your company?

A. Yes, sir; there was an order issued against us to cease and desist from leasing and loaning them at a nominal sum.

Q. I hand you this paper——

Commissioner THOMPSON. What is that you hand him?

Mr. ZECHIEL. I want to introduce this in evidence.

Commissioner THOMPSON. I know, but identify it.

Mr. ZECHIEL. A copy of the order to cease and desist in Docket No. 85, Federal Trade Commission versus Standard Oil Company of Indiana, an Indiana corporation.

Q. (By Mr. ZECHIEL.) Is that a copy of the order that was entered against your company in that proceeding as to which you are testifying?

A. Yes, sir.

Mr. ZECHIEL. If the commission please, I offer this copy of order to cease and desist in Docket No. 85.

(The order referred to was received in evidence, marked "D Exhibit No. 1.")

Q. (By Mr. ZECHIEL). I hand you the tank-loan agreem Exhibit A in the answer of the Standard Oil Company of Ind in Docket No. 85, Federal Trade Commission versus Standard Company, an Indiana corporation, which purports to be a tank- agreement entered into with customers of the Standard Oil C pany of Indiana. I direct your attention to a paragraph in purported tank-loan agreement and ask whether or not that p graph requires the lessee of an oil tank and pump to use onl connection with that oil tank and pump gasolene sold by the St ard Oil Company of Indiana?

A. (After examining the paragraph referred to.) Yes.

Q. That is correct, is it?

A. Yes, sir.

Q. (By Commissioner THOMPSON.) Mr Drake, it was custom was it not, to enforce that clause of the contract?

A. No; I do not know that it was ever enforced, nor e

134 taken out because a man put anybody else's gasolene in. I ever recall.

Q. (By Mr. ZECHIEL.) Did you ever have any complaints f any of your agents that anybody ever violated that provision the contract?

A. I do not recall any.

Commissioner THOMPSON. May I not ask if the stipulation d not admit that fact?

Mr. ZECHIEL. I do not think the stipulation does say, Mr. Tho son, that that is the fact.

The ACTING CHAIRMAN. Does or does not? What did you s

Mr. ZECHIEL. The stipulation does not say anything about t feature of the practice.

Q. (By Mr. ZECHIEL.) Mr Drake, after this order to cease desist, about which you have testified, in Docket No 85, was ser upon the Standard Oil Company of Indiana, did the Standard Company of Indiana attempt to follow out the requirements of order to cease and desist?

A. It did; yes, sir.

Q. What were the results experienced by your company follo ing its attempt to obey the order to cease and desist?

A. Many of the tanks and pumps were bought by the custom and then they made arrangements to buy their goods from competitor.

Q. In every case the customers purchased your oil tanks a pumps that you had installed under the lease?

A. No, not in every case.

Q. What is the fact about other cases?

A. Some of them were taken out and some of them were re-leased a reasonable consideration.

Q. In attempting to cancel these contracts and remove the pumps lease them under a reasonable rental, did you lose any customers?

A. We have.

Q. Describe in detail those occurrences.

A. In many cases because we refused to lease them at a nominal m we took the tanks and pumps out and they refused to buy of us future. In some cases they bought them and agreed to buy from competitor because of the fact that they could lease them. He uld pay them a rental for the privilege of putting his goods in em.

Q. Upon learning of that fact in connection with your attempt to follow the order of the commission in Docket No. 85, did you make any effort to have the commission modify the der?

A. Mr. Martyn can answer that.

Q. Do you know it to be a fact, Mr. Drake?

A. Yes.

Q. What was the general nature of that effort made?

A. I do not know.

Commissioner THOMPSON. Perhaps the witness does not know that. s counsel is probably the one that does.

Mr. ZECHIEL. I supposed that Mr. Drake, having made an affidavit connection with it, would know.

Q. (By Mr. ZECHIEL.) Do you know as a matter of fact whether ur company made a motion before the commission to have this der modified or set aside?

A. I do.

Q. I am handing you herewith a copy of the motion and am diting your attention to the affidavit purporting to be your own davit, Mr. Drake, and asking you if it is, as a matter of fact, ur affidavit?

A. It is; yes.

Q. On page 3 of that affidavit, reading from the affidavit, it is ted:

"Affiant further says that he has been connected with the sales partment of respondent for many years last past, and was so nected with it when the practice of loaning and leasing pumps l tanks to customers was inaugurated, and said practice of leasor loaning tanks and pumps, for a nominal consideration, or free charge, was inaugurated by the competitors of the respondent, l respondent thereafter adopted such practice merely as a matter self defense to meet in good faith the competition so tendered it its competitors; that such practice has been and is contrary to judgment of the sales managers of respondent and is in their gment bad merchandising."

hat is a fact, is it?

A. Yes, sir.

Q. How much of an investigation had you made at the time y signed this affidavit?

A. I had taken it up with the sales managers of the entire ter tory and got expressions from all of them.

Q. (By Commissioner THOMPSON.) Why do you say it is b merchandising? How do you arrive at that conclusion?

A. Because I never thought it was good merchandising to give man something to get him to buy something from you.

Mr. ZECHIEL. That is all I care to ask the witness.

136 Commissioner THOMPSON. Does any one wish to cro examine the witness?

(No response.)

Mr. OSBORN. I want to ask you one question, Mr. Zechiel. Is th affidavit in evidence? Did you introduce it in evidence?

Mr. ZECHIEL. I did not introduce it in evidence.

The ACTING CHAIRMAN. This last affidavit?

Mr. ZECHIEL. Yes, sir.

That is all, Mr. Drake.

(Witness excused.)

H. F. BAGBY was called as a witness by and on behalf of the Fe eral Trade Commission, and, being first duly sworn, testified a follows:

Direct examination:

Q. (By Mr. ZECHIEL.) With what company are you connecte

A. White Eagle Oil Refining Company of Wichita.

Q. How long have you been connected with that company?

A. Ever since its organization, July, this year.

Q. Prior to that time what was your experience generally in t oil and gasolene business?

A. I was secretary of the American Oil and Gasolene Compa five years prior to that.

Q. Where did the American Oil and Gasolene Company operat

A. In Kansas and Colorado.

Q. Generally throughout those States?

A. Eastern Colorado and generally in Kansas—western Kans mostly.

Q. Where does the White Eagle Oil & Refining Company operat

A. Kansas and Colorado; that is, the distribution end of it business.

Q. You mean that is where they do their wholesale business?

A. That is right.

Q. You are acquainted with their method of doing business, a you?

A. Yes, sir.

137 Q. Do they sell gasolene from out of the State of Kans into the State of Colorado?

A. Yes, sir.

Q. Kansas is your headquarters State, is it not?
A. Yes, sir.
Q. In connection with your gasolene business do you also do a business in oil tanks and pumps?
A. Very little.
Q. Do you lease or loan oil tanks and pumps?
A. This company, since its organization in July, has not sold any tanks and pumps or leased any.
Q. (By the ACTING CHAIRMAN.) Or given them away?
A. Or given them away; no sir.
Q. (By Commissioner THOMPSON.) Why have you not done so?
A. Our company has eighty per cent of its business in country stations—that is, where we have any filling stations to compete with—and the garages buy their pumps direct from pump manufacturers in our territory.
Q. (By Mr. ZECHIEL.) You do not handle any pumps at all—your present company does not?
A. We do not make a business of it. We have a pump company or two that we recommend, but we allow the customer to buy them.
Q. Who are your competitors in that territory?
A. Standard Oil Company of Indiana, mostly.
Q. Does the Sinclair Company sell there?
A. They are a competitor, too.
Q. Does the C. L. Smith Oil & Gasolene Company sell in your territory?
A. Not that I know of.
Q. What are the other competitors besides the Standard?
A. The Sinclair is the next largest, and then there are several small companies.
Q. Who are they?
A. The Puritan Oil Company is one, and the Crew-Levick is a competitor of ours.
Mr. ZECHIEL. I think that is all.
Q. (By Commissioner THOMPSON.) Did I understand you to say that since July 1st you had ceased this practice?
A. That was the beginning of our organization. We absorbed these other companies as of July 1st.
Q. Is it your intention not to continue this practice or to adopt this practice?
A. Unless we are forced to it. We do not approve of the practice.
Q. Why do you not believe in the practice or approve of it?
A. It is not a profitable way of doing business, we do not think.
Q. (By the ACTING CHAIRMAN.) Have you any filling stations?
A. We have three in Topeka. We are building three or four in Wichita. That is all the filling stations we have. Practically all of our business is in the small towns where they do not have filling stations.

Q. Would you say, as a practical dealer in gasolene, that the evolution is towards the filling stations, away from the occasional pump?

A. That seems to be the trend.

Q. Why is it true?

A. Well, I think on account of the more convenient service, more than anything else.

Q. You have not had sufficient experience with the filling stations personally to know whether or not, considering the fact that it is located on expensive real estate, generally on a corner where traffic passes in large volume and the fact that there is not constant employment for the attendant—you have not had the experience to prove to you that it is profitable?

A. Our experience is not broad enough to form an opinion on that just yet.

Q. Did you make any previous examination before you went into the filling station business?

A. We only went into the filling station business in these two towns, where it is, you might say, a filling station proposition. The garages hardly handle very much stuff except in large towns. We did not investigate it, only from a gallonage standpoint.

Q. Do you handle lubricating oils?

A. Yes, sir.

Q. In your experience in the past, would you say that there is more profit in the sale of lubricating oil than there is in the sale of gasolene?

A. Yes, sir.

Q. Is it sufficient to enable you to say that in a given station which sells lubricating oil, by reason of its greater margin it would carry the gasolene expense? That is, is it so much more profitable?

A. I would hardly say that.

139 Q. (By Commissioner THOMPSON.) Do you think the filling station will ever drive out the pump entirely? Will there not be a demand for both?

A. I would say that, generally speaking, over the territory, it will be a great many years before they will entirely drive out the pump business.

Q. In other words, the filling stations can only exist where there is concentration of people and business?

A. That is right.

Q. (By the ACTING CHAIRMAN.) Where does that point of concentration begin? You are from my territory, and I am familiar with the towns. Wichita, of course, has filling stations, but Valley Center, which is a town of 500 people, ten miles from Wichita, has not, has it?

A. It has not, and it would not be a paying proposition in a town of that size.

Q. Has Sedgwick, which has 1,200 people?

A. No, sir.

Q. Has Newton, which has 12,000?

A. Yes, sir; they have. The average dividing line would be between two and three thousand people, although over there in the western part of the State there are hardly any filling stations in most of those county seats out there, two thousand to four thousand people.

Q. (By Commissioner THOMPSON.) How long have you had these filling stations in Topeka?

A. The company we took over has had them there about two years, I think.

Q. You have not had time to observe whether it is a paying proposition as against your overhead and the amount of your investment, and so forth?

A. In Topeka we consider it a paying proposition.

Q. (By the ACTING CHAIRMAN.) You consider it poor merchandising to give away something, to sell something, do you not?

A. Yes, sir; that is our attitude.

Q. So, since July 1st you have given away or leased at a nominal figure no pumps?

A. That is right.

Q. That was your inspiration, that was your motive, because it was not good merchandising. What is the difference between giving away or leasing a pump at a nominal figure and running a filling station at a loss?

A. You would have to get figures on that. It might pay, to give away a pump and let somebody else bear the operating expense.

Q. I just wanted your idea about it. Of course you are new in the filling-station proposition.

Q. (By Commissioner THOMPSON.) Is there much competition in the filling-station system in Topeka?

A. Oh, yes.

Q. In Wichita?

A. Both of them.

Q. (By the ACTING CHAIRMAN.) Why in the western country, particularly in Wichita and Topeka, do the men who own filling stations go into so much landscape ornamentation and why do they avoid it in a city like Washington? What is the reason for that?

A. That is a puzzle to me. I noticed that to-day, here.

Q. (By Commissioner THOMPSON.) Why the ornamentation? Is that for advertising purposes?

A. I think that a good many of these filling stations are being built in the residence districts and that is probably a local requirement, to a certain extent. We had quite a little trouble the other day getting a location out on Erie and Douglas, and we had to show our plans to the commission and agreed to beautify the grounds. I think it is more a competitive proposition back there.

Q. (By the ACTING COMMISSIONER.) Does it make any appreciable difference in the price of gasolene? Do these men have to pay for those geraniums or not?

A. I do not think so.

The ACTING CHAIRMAN. Is there any cross-examination?

Mr. OSBORN. Yes.

Cross-examination:

Q. (By Mr. OSBORN.) Is it your experience with your company that if you start in the filling-station business in a community or locality you then lose the garage business?

A. That is the general experience.

Q. That you can not very well do both?

A. That wears off in time, I know, but ordinarily that is the attitude of the garages, that they will buy from another competitor.

Q. Whether you furnish them pumps and equipment or not?

141 A. That is right.

The ACTING CHAIRMAN. Why is that, Mr. Osborn? Will you find out? I would like to know why.

Mr. OSBORN. I was going to ask the witness what his explanation of that is.

The WITNESS. Well, generally, the garages in my territory would make about two and a half to three cents a gallon on their product. The filling station comes in and it immediately cuts that profit to a cent a gallon. Naturally there is a hostile attitude on the part of the garages. They generally have local associations, and I have known them quite often to agree not to buy from a company that put in the first filling station.

Q. (By Mr. OSBORN.) Then, with a garage like that, if the company had started in in the establishment of filling stations in Witchita or Topeka, it could not give away these pumps and tanks if it wanted to?

A. Witchita and Topeka are a little different proposition. You might say the trade there and the garages are all educated in the filling station proposition. The companies there, unless, I think, the Standard Oil Company, discontinued it the first of July, but other companies there, up to that time—I do not know about it since. We have not—they have been giving pumps; but I think one company would have as much chance as another in Wichita and Topeka. Whether that would have been true when the filling station proposition was first started or not I cannot say. That has been several years ago.

Q. It is your experience that the tendency is if a company gets in a town and establishes a filling station business, the company then loses the garage business that it formerly had?

A. That is generally the case, in my experience.

Q. That business then falls to companies that do not establish a filling station?

A. That is right. Of course, in time that wears off, and they are all somewhat on an equal basis. But that is the first feeling in the garage trade.

Q. Is it your experience that that is one of the risks the larger companies run in establishing filling stations, that it tends to lose the garage business?

A. I would say that any company would run that risk.

Q. That leaves the garage business to fall to what might be called the smaller companies or the smaller dealers?

142 A. Eventually if the town is large enough the trend will be to the filling station way of marketing. Of course a great many garages will refuse to handle it on a cent a gallon and will discontinue it. That has been my experience, too—quit handling gasolene.

Mr. OSBORN. I believe that is all.

(Witness excused.)

Mr. ZECHIEL. I want to introduce in evidence the stipulation between the Federal Trade Commission and the Sinclair Refining Company in Docket No. 334, for whatever it may be worth on the question of jurisdiction generally in the various cases.

(The stipulation referred to was received in evidence, as commission's Exhibit No. 1.)

W. E. WILLIAMS was called as a witness by and on behalf of the Federal Trade Commission, and, being first duly sworn, testified as follows:

Direct examination:

Q. (By Mr. ZECHIEL.) Mr. Williams, with what company are you connected?

A. Iowa Oil Company.

Q. Is the Iowa Oil Company one of the companies who is respondent here in these hearings?

A. Yes, sir.

Q. How long have you been connected with the Iowa Oil Company?

A. Five years.

Q. Prior to that time had you had any experience generally in the oil and gasolene business?

A. I was with the National Refining Company about a year.

Q. Any other experience?

A. No, sir.

Q. What is your position with the Iowa Oil Company?

A. Manager.

Q. Over what territory generally, geographically, does the Iowa Oil Company conduct business?

A. Well, we have a small part of northeastern Iowa and a small portion of Illinois and Wisconsin. We have one station in 143 each case, one at Galena and one at Prairie du Chien, Wisconsin.

Q. You mean, you have one station in Illinois and Wisconsin?
A. Yes, sir.
Q. And most of your business is confined to the State of Iowa?
A. Yes, sir.
Q. But you do ship gasolene and refined oil and similar prod from the State of Iowa to Illinois and Wisconsin?
A. Yes, sir.
Q. In connection with your gasolene business do you lease and l oil tanks and pumps?
A. We do.
Q. Do you also sell oil tanks and pumps?
A. We do.
Q. Where do you purchase your pump equipments generally?
A. We are using the S. F. Bowser outfit.
Q. The S. F. Bowser Company is located at——
A. Fort Wayne, Indiana.
Q. How do you have those pumps shipped to you when you them and supply them to your customers?
A. We order them just as we need them.
Q. Do you mean that if you have a customer who needs a pump order it for that customer?
A. Yes, or for ourselves, and place it.
Q. Do you frequently order pumps and tanks shipped dire from the Bowser factory at Fort Wayne, Indiana, to your custom over in Iowa, or——
A. No, sir.
Q. It is always billed to you?
A. Every outfit is; yes, sir.
Q. But you buy it expressly for one particular customer.
A. Yes, sir.
Q. It is the general practice to install that particular pump t you order for the particular customer, with the customer?
A. Yes, sir.
Q. What are the general terms of your contract?
A. Up until last spring we placed them on a basis of one doll month rental.

144 Q. You do not have a copy of your contract with you?
A. The new one we have—I think I have one here [hand a paper to Mr. Zechiel]. The new contract we made along in Ma or April. We turned all of those over.
Q. With reference to the contracts and agreements under wh you did operate prior to the one which you have just handed here, what were the general terms and conditions of those contra
A. Practically the same terms, with the exception of the last pa graph of that agreement.
Q. What was the provision in that particular paragraph?
A. It was in regard to handling other products at the station.

Q. In general, what were the terms of your contract? How did you install these pumps with your various customers—on what condition or understanding?

A. They were to pay a rental of one dollar a month and that they were to use only our gasolene in the pump during the life of the agreement, which was one year. They had the right at the end of the year to buy the outfit at a reasonable price, allowing for depreciation.

Q. Did you collect this dollar a year?

A. Dollar a month—yes, sir. That practically kept the pump in repair as far as renewing the hose was concerned. That is about all we ever figured on getting out of it.

Q. You never thought that that dollar a month was a reasonable return on the investment?

A. Well, no. We figured that our profit on the merchandise put through it was paying us a reasonable profit.

Q. How many pumps and tanks did you install with your customers under similar agreements and understandings?

A. We have twelve stations. Nine of those are complete outfits. Two of them, where we furnished the head only. The tanks are furnished by the people that we are doing business with. And one outfit is placed with a concern where it also has a National Refining Company outfit. We practically have nine stations of our own.

Q. These are the stations you were referring to a while ago when you said you had one station up in Wisconsin and one in Illinois?

A. No, sir. These are tank-wagon service stations.

Q. (By Mr. BURDEAU.) Do you have any other outfits in other States than Iowa?

145 A. One pump at a store in East Dubuque.

Q. (By Mr. ZECHIEL.) What is the difference between these pump stations you have up in Wisconsin?

A. We have regular tank stations in Wisconsin and Illinois, tank-wagon stations.

Q. You ship and serve out of the station?

A. Yes, sir.

Q. How long have you been engaged in the practice of leasing pumps and tanks?

The ACTING CHAIRMAN. Mr. Zechiel, you are leaving the record a little bit up in the air, I think, because so far as the Commission and the witness and the record are concerned, as I understand it, we do not known what the clause in the second agreement is about which you were talking.

Mr. ZECHIEL. The second agreement I did not intend to put in evidence at all, Mr. Murdock. It was an agreement under which we have b'ought this complaint that I was referring to only.

Q. (By Mr. ZECHIEL.) This paper you handed me is the one you are operating under now?

A. Yes, sir.

Mr. ZECHIEL. I am calling the witness' attention to a memorandu of agreement entered into by the Iowa Oil Company, which I w ask to have marked for identification.

(The agreement referred to was thereupon marked by the repor "Williams' Exhibit No. 1 for Identification.")

Q. (By Mr. ZECHIEL.) That is the agreement under which you a operating at the present time?

A. Yes, sir.

Q. Is that agreement in force with all the stations with which y had these prior agreements to which you have referred?

A. We had four stations put in since we changed this over l summer. We were only operating, I think, five stations on the agreement.

Q. Your statement a while ago as to the number of leased a loaned tanks you have out now included those with whom you h this agreement also?

A. Yes, sir.

Q. At what time did you start using this form of contract?

A. Early in the spring; I cannot tell you just when.

Q. What was the occasion of your change from the use of prior contract to this one——

146 Commissioner THOMPSON. When you are speaking of "t one," what do you mean? Marked exhibit what?

Mr. ZECHIEL. Williams' Exhibit 1, for identification.

Commissioner THOMPSON. Let us refer to it as "Williams' Exhi No. 1" each time.

The WITNESS. The object in getting this agreement was to h them all uniform. We had two stations at a little out-of-the-w place in the hands of people that felt they could not afford to t this on solely on a free basis.

Q. (By Mr. ZECHIEL.) What do you mean by a free basis?

A. No expense connected with the installing of the pump or ke ing it in repair.

Q. (By Mr. BURDEAU.) I would like to ask you whether or that contract differs from your previous contract in any way exc in the last paragraph?

A. Yes, sir. The original agreement stated that we were to h the exclusive sale of the gasolene during the life of the contract.

Q. That now is changed in the last paragraph of Williams' hibit 1?

A. This one says they have a right——

Q. They can put in some other equipment?

A. Yes, sir; they have that right.

Q. I ask in what other respect does Williams' Exhibit 1 di from your former contract?

A. The former one I do not have. This last clause——

Q. That is the only difference?

A. And the consideration of one dollar a month.

Commissioner THOMPSON. What is this last clause you speak of?

Mr. BURDEAU. The last clause is this:

"It is further agreed that ------ [meaning the dealer] have the privilege of installing outfits of like nature of another oil company for the purpose of handling their oils if so desired."

Q. (By Mr. BURDEAU.) That has been effective from what date?

A. That was along about the first of April.

Q. How did that change come to be brought about in your contract?

A. We have one station where the National Refining Company have a pump in, also, and we figured if they cared to
147 install this other equipment we had no right to say they could not.

Q. There was no benefit or advantage to you under such a contract, was there?

A. We have the reputation of handling quality gasolene, and our pumps are all equipped with our signs over them, and we do not want an inferior grade of gasolene put in them. That is one reason why we asked that they be not used for any other oil companys' products. These pumps are located in different parts of the city convenient to the trade that are patronizing us.

Q. (By Commissioner THOMPSON.) Do you consider it good merchandising to install a pump at a nominal price—as I understand it, that is what you do—and permit a competitor to also install a pump?

A. In some places that kind of an arrangement will work out all right. In others it would not. In the Dubuque territory there is nothing but hills. The people living away back on the hills, if they have to go down on the level to get their supplies, I think in that case it would be all right. Where the drive-in stations are handy I think it is all wrong. We have pumps located out at the outskirts of the city, and it is a very inconvenient matter for the people to go down town to get their supplies. Generally those pumps are placed in some little store that is not financially able to get this equipment.

Q. These pumps cost you approximately four hundred dollars?

A. They run in the neighborhood of about three hundred dollars.

Q. Would it pay you to put in an investment at a nominal sum of three hundred dollars, with the purchaser at the same time putting in the pump of a competitor?

A. Well, no. The idea is here: If they wanted the competitor's line of merchandise they would probably make application to put their equipment in. This business has not been solicited by the Iowa Oil Company itself, personally; this business has come to us with a request to place these stations at these different points as a matter of convenience to the trade.

The ACTING CHAIRMAN. I wish you would get Mr. Williams to explain to me, because my mind does not follow it, just what is the

difference between the hill proposition and a valley proposition in this case.

148 The WITNESS. If you are living a mile and a half or two miles away, amongst the hills and the only source of supply you had for your gasolene was driving down town to get it, it would be very convenient to you to go to a little curb station upon the hill some place and get your supply.

Q. (By the ACTING CHAIRMAN.) Correct. I can see that; but just why would that warrant the installation of two pumps on the hill at a given place as against two pumps in the valley? I do not get that.

A. The idea is this: If you had a certain line of trade that was demanding your merchandise, it would not make any difference if there were half a dozen pumps up there; you would get the business.

Q. I am beginning to see.

A. Our trade is a trade that is asking for a little higher grade of merchandise than some of our competitors are delivering.

Q. (By Commissioner THOMPSON.) So, when you put in a pump as against a pump of a competitor, your hope of getting business is because you put in a better class of merchandise?

A. We have always handled a better class of merchandise. Our reputation along that line has brought these requests to place these different pumps, what few we have got, in these different locations.

Q. (By the ACTING CHAIRMAN.) Do you handle lubricating oil?

A. Yes, sir.

Q. Is there a greater margin of profit on lubricating oil than on gasolene?

A. The little we get comes unsolicited so far as the general run of business is concerned. There are a lot of garages to which we are selling gasolene that do not handle our lubricating oils.

Q. (By Commissioner THOMPSON.) In how many instances where you have a pump installed with a purchaser has a competitor a pump installed?

A. We have one garage.

Q. Only one out of how many pumps did you say you had installed?

A. We had twelve.

Q. (By the ACTING COMMISSIONER.) Is this garage on a hill?

A. No, sir; it is a downtown outfit.

Q. (By Mr. BURDEAU.) Whose outfit was in there first?

149 A. They were both put in the same time—one, the National Refining Company.

Q. Was that a new station?

A. Yes, sir.

Q. And the arrangement was made with your company at about the same time that the garage man made his arrangement with the other company?

A. The pumps went in at the same time. When they built the building they put them both in.

Q. (By Commissioner THOMPSON.) In Dubuque have you two places on the hill where they have two pumps installed?

A. Not that I know of. Another oil company has a pump up there at one place.

Q. What is the name of that company?

A. The Leader Oil Company has a pump station on the hill.

Q. Is there any other competitor's pump at the same place?

A. No, sir.

Q. (By Mr. ZECHIEL.) Did you ever succeed in taking business away from a competitor by the installation of one of these pumps under tying contracts?

A. Not that I know of.

Q. Have you ever refused to put in a pump under one of these contracts where a garage man or retailer asked you to install such a pump?

A. Yes, I have, on account of people located out—I figured that they would not be there only a month or six weeks and would be looking for another location; or if it was too close to another pump that we might have installed. Our object was to divide up the territory so that our trade could get convenient service. I could have put in a hundred if I had wanted, but we stayed away from as far as we could, just merely to give the service to those we had installed.

Q. Did you lose the business of those companies?

A. Certainly.

Mr. ZECHIEL. That is all.

Commissioner THOMPSON. Is there any cross-examination?

(No response.)

The ACTING CHAIRMAN. I would like to ask Mr. Williams just this question, because I am interested personally in the subject.

Q. (By the ACTING CHAIRMAN.) Is the Iowa Company a very old company?

A. It is about thirteen years old. I do not know just how old they are. I have been there for five years with them. I think it was 1913 they started. It originally was the Keith City Oil Company, a little local institution.

Q. Are there refineries in Iowa anywhere?

A. Not that I know of.

Q. The reason I asked that is that some years ago I saw, along a railroad track in Iowa, a small number of tanks with the name of an oil company on them and it said this was the first oil company in Iowa. It did not look very prosperous to me, and I wondered what its history was. I thought maybe yours was an outgrowth of that company.

A. No, sir. The company started there, I think, along about 1912, when a few of the business men got together and started it to sell to launch owners and one thing and another who wanted to get a little better grade of merchandise than was being delivered there.

Q. Petroleum has never been found in the State of Iowa, has it
A. Not in any large quantities, I do not think.
Q. Shipments come from where?
A. Oklahoma, mostly.
Q. The Wyoming field does not supply you?
A. No, sir.
(Witness excused.)

L. B. HANCOCK was called as a witness by and on behalf of t Federal Trade Commission, and, being first duly sworn, testified follows:

Direct examination:

Q. (By Mr. ZECHIEL.) With what company are you connected?
A. Pure Oil Company.
Q. Where is that located?
A. Minneapolis.
Q. Where is the general geographical territory over which t Pure Oil Company does business?
A. The Northwestern States, in Minnesota, Wisconsin, So Dakota, North Dakota, Montana, Wyoming, Idaho, and Wa ington.

151 Q. Your headquarters are where?
A. Minneapolis.

Q. Do you ship gasolene and other oil products from the city Minneapolis to various parts of those States?
A. We do not ship it from Minneapolis—we ship some fr Minneapolis.
Q. Do you ship gasolene and oil products from one State another in the course of your business?
A. Yes, sir.
Q. How long have you been with the Pure Oil Company?
A. Fifteen years.
Q. Had you had any experience in the gasolene business and business generally, prior to that time?
A. About eight years.
Q. What capacity were you with the Pure Oil Company dur your connection with that company?
A. I have been managing the company all the time.
Q. Does your company buy and sell or lease and loan oil tan and pumps in connection with its business?
A. We buy and sell and lease a few.
Q. You say you lease a few. Do you mean you lease a few und tying contracts for a nominal consideration?
A. We have a few of that kind—four, to be exact.
Q. Where do you buy your oil tanks and pumps?
A. We buy them from several pump companies—the Western Tank & Pump Company——

Q. Located where?
A. At St. Louis; and the Wayne Oil Tank & Pump Company.
Q. Fort Wayne, Indiana?
A. No; I think they are at Indianapolis. I am not certain just here they are located.
Q. They are an Indiana corporation?
A. I think so.
Q. From any other companies?
A. We have bought from other companies—the Milwaukee Oil ank & Pump Company.
Q. Do you buy these pumps and tanks in carload lots?
A. No, sir.
Q. You buy them in individual shipments?
A. Yes, sir.
Q. Do you have the outfits shipped from the factories direct to e customer to whom you lease, loan, or sell?
A. To those we sell to we have them shipped direct to the customer. Where we lease them, we have them shipped directly to ourselves.
Q. Where you have them shipped to yourself, do you have a par-ular pump ordered by a particular customer?
A. No, not necessarily. I think in this case, in the four instances, e have ordered them for a special purpose.
Q. You use them for the purpose for which they were ordered?
A. Yes, sir.
Q. Those pumps were all shipped from outside of the State to eir final destination?
A. Yes.
Q. Who are your competitors, generally?
A. We have, in the cities of Minneapolis and St. Paul, about fteen competitors, and over the territory perhaps as many more.
Q. Is the Sinclair Company one of your competitors?
A. Yes, sir.
Q. The Bartles Oil Company?
A. Yes, sir.
Q. Where is the Bartles Oil Company's headquarters?
A. St. Paul.
Q. Does the Iowa Oil Company sell in your territory?
A. Not that I know of.
Q. You do not sell in the State of Missouri, do you?
A. No, sir.
Q. In your experience in the gasolene business have you come in ntact with the individual garages and other retailers?
A. Not personally.
Q. You have been about over the country in your territory, ough, and have seen many of these garages and retail places?
A. Yes, sir.

Q. What is your experience whether or not the garages or oth retail places have more than one pump and tank installed?

A. I do not know of any instance where they have more th one pump, in our whole territory.

Q. Have you ever refused to lease and loan pumps under the contracts for a nominal consideration, tying contracts, to custom who requested them?

A. Yes, we have.

153 Q. What was the result of your refusal to lease the pump

A. The party that will do it will get the business.

Q. You lost the business of that company?

A. Yes, sir.

The ACTING CHAIRMAN. Mr. Zechiel, just as an economic prop sition, I would like to know from Mr. Hancock what determines h company to give a pump to one man and not to give it to another ma

The WITNESS. I presume, the prospects for the amount of busine Some customer or some garage might not be so located that the business would seem sufficient.

Q. (By the ACTING CHAIRMAN.) Unquestionably you have a gre many more men apply to be given a pump than you can accommoda

A. Yes; that has been true.

Q. You looked over the location, took into consideration the tra along that street, before you gave the pump?

A. Yes, naturally.

Q. When you were figuring on the volume of sales, what were y mentally doing in the way of accounting——

A. The position of our company has been this, that we did not co mence to put in these pumps until we found we were losing so mu business to our competitors that we were simply forced to do it. W do not make a practice of putting in pumps at any time. We did n until we saw that our competitors were getting our business aw from us.

Q. (By Commissioner THOMPSON.) Do you believe it is good me chandising?

A. No, sir; we do not. We do not consider it so.

Q. Why do you not?

A. Because you are giving a man something for nothing; and the are other considerations, of course.

Q. (By the ACTING CHAIRMAN.) It did not appeal to you when y had to go into it?

A. No, sir; it did not.

Q. (By Commissioner THOMPSON.) Would you like to see the pra tice stopped?

A. We would.

Q. Universally?

A. Yes, sir.

154 Q. (By the ACTING CHAIRMAN.) What is your experien with the sale of lubricating oils in connection with gasoline the way of margin of profit?

A. Oh, the margin of profit is considerably greater in the lubricating oils.

Q. That is, if you eliminated the sale of lubricating oils in connection with gasolene at gasolene stations or pumps, the gasolene would go up in price, would it not?

A. I do not think so.

Q. That is, if it were economically a part of the operation of the station or the pump?

A. You are speaking now of a garage pump, filling station, or just what?

Q. I would say a garage pump. However, my real question is this: If you have a filling station—and I suppose you have filling stations?

A. Yes, sir.

Q. Does your sale of lubricating oil bring in a profit that carries your filling station expense as against the sale of gasolene? It is on a closer margin?

A. It assists, but it does not carry the expense?

Q. (By Commissioner THOMPSON.) You have had filling stations in Minneapolis for quite a long while?

A. Yes, sir.

Q. How did it work out as against the pump? Is it driving the pump out of business, or just simply limiting it?

A. I can give you the number of each, if you like.

Q. What is your approximate judgment on the matter?

A. I do not see that it makes very much difference. We find almost every garage with a pump, particularly when they are put in free.

Q. Will not the garage have to keep the pump if it wants to keep its business? In other words, is not that a thing that the man who saves his automobile with the garage company will want in the way of service, and insist on?

A. Yes; I think so.

Q. (By the ACTING CHAIRMAN.) Mr. Hancock, was there a stage in this pump business in which it became a kind of mania, that everybody was putting in pumps?

A. I think that has been true in the last two years.

Q. Has there ever been a time during that period in which you said to yourself, "There are too many pumps"? Of course, I know you have to be more or less altruistic to say that.

A. When we have a lot of filling stations we are apt to say that. I did not want to make that remark in just that way.

Q. What I have in mind is this: When a new type comes out, in its initial stages there is a propaganda to push its sale, and that multiplies the numbers used beyond any reasonable needs of society; and a business man in your line would study that.

A. That would be true if the business remained constant, but with the ever-increasing demand for gasolene there is not too much equipment, I do not think, for the distribution of it.

Q. So you say it did not reach that stage; your answer would be no?

A. I think so.

Q. (By Mr. ZECHIEL.) It has been asserted a number of times that the leasing of oil pumps and tanks in the manner in which a number of companies have leased them for a nominal consideration under tying contracts, was necessary in order to prevent fraud on the public in the use of these tanks for storing and retailing gasolene of an inferior quality compared with that of the company which leased or loaned the pump. Is that necessarily true, or might there be some other means of identifying the gasolene which comes from one of these pumps and tanks, even though the garage man owned his own pump or it were leased or loaned under condition that anybody could use the pump?

A. I do not believe that there would be very much foundation for such a conclusion, because it is as much to the garage man's interest to handle good gasolene as it is to have a pump.

Q. Would it be feasible in your opinion for electric light signs or bulbs, for instance, that frequently occur on the top of the pump to designate the product that is being sold from any particular pump outfit?

A. Would it be necessary, you say?

Q. I say, would it be feasible to use that as a way of designating the kind of gasolene that is being distributed from that pump?

A. I think it is customary in our business.

Q. It is not necessary, therefore, to actually lease or loan a pump for a nominal consideration under a tying contract in order to designate whose gasolene is being sold from the pump?

156 A. I do not consider it so.

Mr. ZECHIEL. I guess that is all.

Commissioner THOMPSON. Is there any cross-examination?

Mr. OSBORN. I would like to ask a question or two.

Cross-examination:

Q. (By Mr. OSBORN.) Is it your experience that if dealers and garage men and others use their own equipment and a customer drives up and calls for any particular kind of gasolene, the dealer always has that particular kind that he calls for, no matter what kind he calls for?

A. Perhaps if he did not have a sign, if he was unscrupulous, he might do that. I know I have personally gone to pumps and asked what kind of gasolene was being sold, and was told.

Q. In your experience with your company—the Pure Oil Company, you said?

A. Yes.

Q. (Continuing.) Have you ever figured or considered that having your own equipment in there with the condition in the contract that the dealer should not handle any product through that equipment but yours, afforded you and your customers any protection?

A. I do not quite get your thought in the matter.

(By request, the reporter read the pending question as above recorded.)

Q. (By Mr. OSBORN.) I might add this—any protection that the customer would get your gasolene?

A. I might answer that in this way, that we sell gasolene of a certain brand to a number of garage customers who own their own pumps. We put up a sign to indicate that they are selling that particular brand and grade of gasolene. Does that answer your question?

Q. No, not really.

The ACTING CHAIRMAN. No, that does not.

Q. (By Mr. OSBORN.) Maybe I can make myself clear in another way.

It is my understanding from your statement that in your contract there is a condition that when you loan a dealer equipment you place in your contract a condition that he shall not handle in that equipment any gasolene but yours.

A. We do not have a contract, but it is generally understood that when we furnish a pump the customer will buy from us, and that does afford some certainty that you are going to sell that customer, particularly if you do have a contract.

Q. You want to do that with the public, do you not—assure them that they will get your commodity if they ask for it?

A. We have not had any occasion to use that means for giving our customers what they want.

Q. I understood you to say in your direct examination that when a dealer applied to your company for the loan of equipment you made some investigation as to the amount of his business before you would consent to loan him any equipment. Have you made any calculation as to the amount of gallonage or quantity of his output that he must handle before you loan him equipment?

A. I do not think we have.

Q. How many gallons per month?

A. We have only about four pumps of this kind on a leasing proposition. We have made no calculation as to the quantity.

Mr. OSBORN. I believe that is all.

Mr. ZECHIEL. That is all.

(Witness excused.)

J. M. WELCH was called as a witness by and on behalf of the Federal Trade Commission, and, being first duly sworn, testified as follows:

Direct examination:

Q. (By Mr. ZECHIEL.) Mr. Welch, with what company are you associated?

A. The Illinois Oil Company of Rock Island.

Q. Where is the headquarters of this company—Rock Island?

A. Rock Island, Illinois.

Q. Over what territory generally, geographically, by States, does your company do business?

A. Minnesota, Wisconsin, Iowa, Illinois, Missouri, Kentucky, Tennessee, and Oklahoma.

Q. You sell gasolene at wholesale through all this territory?

158 A. Wholesale and retail.

Q. And you ship it back and forth across the States in the course of your business?

A. Yes, sir.

Q. Do you also deal in gasolene pumps and tanks in connection with your business?

A. Yes, sir.

Q. Do you sell them or lease them and loan them, or both?

A. No; we sell them.

Q. You do not do any leasing or loaning?

A. No; no leasing or loaning.

Q. Do you sell these pumps and tanks throughout all this territory, generally.

A. Yes, sir.

Q. Where do you get your pumps; from whom do you purchase them?

A. The last two years, from the Pennsylvania people at Lancaster, Pennsylvania?

Q. Is that the Guarantee Liquid Measuring Company?

A. No, sir. We are handling some of those now. Our big pumps are from the Pennsylvania concern.

Q. The Guarantee Visible Measure?

A. No, sir.

Q. They are located in Lancaster, Pennsylvania?

A. Lancaster, Pennsylvania; yes, sir. I forget the name.

Q. Do you buy these outfits in carload lots from the company?

A. Yes, sir.

Q. And have them sent where?

A. To Rock Island, Illinois—not in every case. We ship both direct from the Pennsylvania factory to our headquarters in Kentucky or in Oklahoma, but as a rule the bulk of the shipments come to Rock Island, Illinois.

Q. Do you have any individual pumps shipped from the factory to any particular place?

A. Yes; we do.

Q. On occasions where you have individual equipment shipped out, do you have them billed directly to the purchaser?

A. No; they are billed to us and we reinvoice them.

Q. Where you have them shipped to you in individual numbers they are at those times purchased for a particular customer, are they?

159 A. No. We purchase them for stock. Whenever the stock runs low we order another carload of pumps.

Q. You never order for individual customers?

A. Oh, yes. We make a direct shipment to that customer.

Q. When you have them shipped to you in carload lots do you store them in your own warehouse?

A. Yes, sir.

Q. And from there you send them out to the customers?

A. Yes, sir.

Q. Do you send them out in the same package in which you received them from the manufacturing concern?

A. Yes, sir.

Q. How long have you been connected with the Illinois Oil Company?

A. Eleven years.

Q. Had you any experience in the oil industry generally prior to that time?

A. Three years.

Q. During the course of your experience have you had occasion to meet the retailers of gasolene products?

A. Yes, sir.

Q. Is that true generally throughout the country in which you are now selling gasolene?

A. Yes, sir.

Q. What has been your experience whether or not retailers of gasolene generally have on their premises one outfit only through which they sell their gasolene, or more?

A. Well, generally more, I think now. The big dealers would have two or three pumps. Of course there are lots of gasolene sold from in front of a little grocery store or blacksmith shop or a little store, where the demand is limited, and one pump is all you will find there, but with the big garages and distributing stations you will find two or three pumps.

Q. Where you find two or three pumps in one garage, are they the pumps furnished by one company or several companies?

A. In lots of cases the dealers himself owns his pumps. He is handling two or three different kinds of gasolene.

Q. Owns his own pumps?

A. Owns his own pumps. It is the small man that has a limited amount of sales that has an inducement to have a pump in free to him.

160 Q. Do you know whether or not these larger garages that you speak of have oil tanks and pumps that have been leased or loaned to them?

A. Some have.

Q. In those cases where they have been leased and loaned to larger garages what is your experience whether or not various oil companies have leased or loaned those pumps or only one oil company has leased or loaned the pump to any particular garage?

A. Well, in most cases there will be two different companies having pumps, if it is a good big garage. You are generally assured by

the dealer that he would not tie himself up exclusively with anybody. If one concern put a pump in for him free he would, in most cases, handle that firm's gasolene through that pump, but he would not tie himself up not to put in another man's pump and handle his gasolene also. If the demand was great enough he would put in one or more pumps of other concerns on the same basis.

Q. (By Commissioner Thompson.) Where he would put in one or more pumps of different competitors would he sell the oil of one competitor and carry it through another competitor's pump?

A. No; as a rule—you are speaking of the leased pump or given away or loaned pump proposition now?

Q. Yes.

A. No; in the most cases they deal fairly, that we have a contract with. Of course, in the last couple of years there were times in every town when this oil company or that oil company was out of gasolene, during the busy season, three or four or five days, and unable to take care of the trade. The other competitor may have gasolene; and in cases of that kind the dealer would put somebody else's gas through the other fellow's pump.

Q. That is an unusual situation, though?

A. Yes, sir. In ordinary cases he would deal fairly with the man that loaned him the pump. He would handle his gasolene exclusively through that pump.

Q. (By Mr. Zechiel.) It is not a common thing, though, is it, Mr. Welch, for one garage to be handling gasolene through sets of leased pumps?

A. I do not think it ever got to be a very common thing. With the big gasoline trade over the country the most of the pumps have a nominal figure and it never got to be very bad.

161 Q. I mean, if one particular oil company leased a pump to a particular garage man, it is not common for that same garage man to have another pump leased from another oil company, is it?

A. It is if his business justifies it: that is, where the trade is big enough, where his business is big enough.

Q. (By Commissioner Colver.) Do you know of such instances?

A. Oh, yes, sir.

Q. Can you name them?

A. More so in the past than at the present time. At the present time the filling station proposition is taking all the business away from the garages.

Q. Can you name one?

A. The Totten Auto Company in our town used to have two pumps there.

Q. Have they now?

A. They quit handling gasolene on account of the filling stations.

Q. Do you know of any other instance?

A. The Tri-State Auto and Supply Company have two pumps.

Q. Now?

A. Yes, sir.

Q. (By Commissioner THOMPSON.) Are they the pumps of competitors?

A. One is their own and one belongs to the oil company—no; they are both owned, now.

Q. (By Commissioner COLVER.) We are talking of two pumps supplied under contract or loaned by two competing companies.

A. I do not know that I can name the firms now.

Q. You do not know of any instance?

A. It seems to me in the last couple of years the gasolene business got so small on account of the filling stations——

Q. (By Commissioner THOMPSON.) Do you know of any in Rock Island?

A. I do not think I do at the present time.

Q. (By Commissioner COLVER.) Then do you want to change your answer where you said you knew of any such cases?

A. I did in the past. I know a number of garages now that have two pumps and are not using either one of them.

Q. Pumps of competing companies?

A. Yes, sir.

Q. What was the name of the concern?

A. The Totten Auto Company had the Standard Oil Company's pump and the Iowa Oil Company's pump.

Q. (By Commissioner THOMPSON.) In Rock Island?

A. Yes, sir. Now, I know neither one of the pumps is in use.

Q. (By Commissioner COLVER.) When was that?

A. Four or five or six years ago, when the garages were selling all the gasolene sold.

Q. (By Commissioner THOMPSON.) What is the town across the river?

A. Davenport.

Q. Do you know of any instances in Davenport?

A. No, sir. It is the same over there. There are half a dozen more filling stations and garages that formerly handled gasolene that do not handle it any more.

Q. So you do not know of any merchant or garage in Davenport or Rock Island where they are using pumps of two competitors?

A. Not at the present time I do not; no, sir.

Q. (By Mr. ZECHIEL.) As a matter of fact, at the present time, Mr. Welch, you do not know of cases where two different oil companies are leasing or loaning for a nominal consideration pumps to one garage?

A. No, sir.

Q. You do not know of any cases like that now?

A. No, sir; I do not know of a case.

Q. (By Commissioner THOMPSON.) Do you consider it good merchandising to loan a pump at a nominal consideration to a company in consideration for their selling gasolene for you?

A. Yes, sir; I do.

Q. You think it is good merchandising?

A. I think it was good merchandising in the days it was in its bloom; in the days when it was universally followed.

Q. Do you consider it so now?

A. Now, I do not, because it is unprofitable on account of the filling stations.

Q. (By Mr. BURDEAU.) Is that your personal opinion, or the policy of your company?

A. No, sir; it is my personal opinion. Our company never made it a policy.

Q. Your company is actually opposed to that principle of doing business, is it not?

A. We never depended or had to depend on garages and
163 stores for business. We were running our business on different lines than depending on the dealer and the garage for its outlet of our products.

Q. It is not a fact that your company has signified to a representative of the commission that it was opposed to that principle of doing business?

A. We did as a firm, but as a general practice I do not think it was detrimental to the community. It is safer to handle gasolene. These little dealers could not afford to buy the equipment themselves and if some big oil company or a number of companies could get a pump and make it safe to handle the gasolene that way, I think it was a good thing.

Q. (By Mr. ZECHIEL.) You testified that they could not afford to handle it themselves?

A. Could not afford to handle a pump.

Q. Could the oil company afford to put in a pump for a little dealer at a loss?

A. If they got a nominal rental of a dollar a month, that would pay at least five per cent interest on the investment.

Q. But in many cases they did not get any rental at all.

A. It probably was as cheap a way of getting and holding customers as any other way.

Q. Must it not have been a fact that the oil companies must have made money out of these pumps for these little fellows?

A. They did, I think.

Q. If they made a profit, could not the little man have afforded to have bought his own pump and made a profit?

A. No; the average dealer in these small towns and grocery stores and little garages—the investment would be too great for them.

Q. You testified, I believe, that your business is very largely or almost exclusively with the little fellow?

A. Almost exclusively direct to the consumer.

Q. You do not deal with the grocerymen and that class of people?

A. To just a limited extent.

Q. Did you ever sell your equipment to that class of people?

A. Well, we have sold lots of equipment; yes.

Q. Then it is a fact that these little fellows can afford to buy your equipment?

A. A certain percentage of them can, but there are lots of them that cannot afford it.

364 Q. You found a great many of these people that you testified to be little fellows who were perfectly able to buy this equipment from you?

A. Oh, yes.

Q. If you knew that the pump people themselves had been able to sell thousands of these pumps to numerous dealers that are not large garages, all over the country, would that affect your opinion about whether or not they are able to buy these pumps themselves or whether they must be furnished by somebody, gratis?

A. There were lots of pumps that were probably leased or given away to firms that could have afforded to buy them, but in a number of cases men put in pumps and handled gasolene that could not have afforded to have bought them outright. I do not know which way they would be the largest percentage.

Q. Do you think it is good business for an oil company to lease or loan a pump to one of these small retailers who does not have business enough to make it profitable?

A. In a great many cases I think it was good business.

Q. (By Mr. BURDEAU.) I understood you to convey the idea that you regarded the leasing of pumps purely as a device for getting and holding customers?

A. Yes.

Q. There is no other benefit or advantage to the oil company except the getting of and holding of customers?

A. That is the principle.

Q. (By Commissioner THOMPSON.) It would limit the competition, would it not, after you got the customer?

A. It would for the period of the contract.

Q. Do I understand that your company has ceased to give away equipment?

A. We never made a practice of it.

Q. When you sell it, do you sell it at a profit?

A. We sell them at a fair margin of profit over their actual cost to us.

Q. (By Mr. ZECHIEL.) Have you ever tried to sell gasolene to one of these numerous smaller dealers who have leased or loaned pumps?

A. Oh, evidently we have; yes.

Q. You were not able to sell them gasolene?

A. Not where they had a leased or loaned pump and a contract with another concern.

365 Q. Did you ever lose a customer because some other oil company leased or loaned him a pump at a small rental?

A. I think we have. I would be safe in saying we had lost some.

Mr. ZECHIEL. That is all.

Commissioner THOMPSON. Is there any cross-examination?
(No response.
Witness excused.)

H. C. WURSTER was called as a witness by and on behalf of the Federal Trade Commission, and, being first duly sworn, testified as follows:

Direct examination:

Q. (By Mr. ZECHIEL.) What company are you associated with, Mr. Wurster?

A. With the Hawk Eye Oil Company of Waterloo.

Mr. OSBORN. Pardon me. Waterloo, Iowa?

The WITNESS. Yes, sir.

Q. (By Mr. ZECHIEL.) How long have you been associated with the Hawk Eye Oil Company?

A. About three years.

Q. What was your experience in the oil industry prior to that time, if any?

A. For seven years with the S. L. Collins Oil Company at Knoxville, Iowa.

Q. What is the general territorial extent of your company's business?

A. Northern Iowa and southern Minnesota.

Q. Just two States?

A. Two States; yes, sir.

Q. In the conduct of your business your company ships gasoline and other oil products back and forth across the various States in your community?

A. Yes, sir.

Q. Do you also deal in pumps in connection with your business?

A. Yes, sir.

Q. You buy and sell such pumps to your customers?

A. Yes, sir.

Q. When you buy and sell such pumps, do you sell them at a fair margin of profit?

166 A. A very fair margin of profit.

Q. Do you lease or loan such pumps to your customers?

A. No, sir.

Q. Where do you buy your pumps that you sell to your customers?

A. Bought from the Columbian Steel Tank Company of Kansas City and the Wayne Pump Company, Fort Wayne, Indiana.

Q. Do you buy them in carload lots or individual shipments?

A. Individual shipments.

Q. You buy none in carload lots?

A. No, sir.

Q. Are those pumps you buy from the manufacturing companies do you buy them for a particular customer?

A. No, sir.

Q. Do you ever have any pump sent from the factories to a particular customer?

A. We might on a direct order, or we would not have it in stock—a hurry up order, or something like that.

Q. It is your impression, then, that you have at times pumps sent directly to customers?

A. Yes, sir.

Q. Those you have billed to you, do you send them out and deliver them to customers in the same packages in which they were brought into the State?

A. Yes, sir.

Q. During the time you have been connected generally in the gasolene and oil business, have you had occasion to come into more or less personal contact with the various retailers of gasolene in your territory?

A. Yes, sir.

Q. In your experience, do the retailers as a general practice have more than one oil pump and tank outfit installed?

A. I do not think they do as a rule have more than one.

Q. It is your impression, then, that there are very few garages and other retailers who have more than one such outfit?

A. Very few.

Q. During the conduct of your business has your company ever lost any business because it refused to lease or loan pumps?

1267 A. I would say we have.

Q. You testify from personal knowledge, now?

A. Yes, sir.

Q. Have any of your customers or prospective customers ever asked you for the lease or loan of one of these pumps?

A. Several.

Q. You refused to lease them or loan them?

A. Yes, sir.

Q. Did you lose such customers?

A. Yes. I would say not in all cases.

Q. In many cases?

A. In many cases: yes, sir.

Q. Do you believe it to be a good business practice to lease or loan pumps under a nominal consideration in tying contracts?

A. I do not think it is a good policy: no.

Mr. ZECHIEL. That is all.

Q. (By the ACTING CHAIRMAN.) Why do you not consider it good merchandising?

A. The question comes up where you have to buy your business in that way. I do not think it is good salesmanship. It lets the bars down, and practically there is no limit as to how many pumps you put out. I might add to that that if there could any limit be made as to garages doing a large volume of business in order to protect the independents or the smaller companies against filling stations.

it would be all right; but it is hard to draw a line and consequently I think it is simply poor merchandising all the way through.

The ACTING CHAIRMAN. Is there any cross-examination?

(No response.)

(Witness excused.)

Mr. ZECHIEL. There are no more witnesses. The Bartles Oil Company told me this morning through their attorney that Mr. Merritt would be here, but he is not here. There is an understanding that we are to agree, however, on the stipulation of the facts with the Bartles Oil Company so far as their practice is concerned, their jurisdiction, and that the evidence taken here in this case will go to the economic situation.

Commissioner THOMPSON. The commission's jurisdiction?

Mr. ZECHIEL. Yes, sir; and the evidence taken on the economic situation generally is to be considered as evidence in the case against the Bartles Oil Company.

That concludes the evidence on behalf of the commission,
165 with the exception of the Oklahoma Producing and Refining Corporation of America, for whom I ask a continuance for a later hearing in that territory.

Commissioner THOMPSON. Are we now ready to hear the evidence of respondents in answer to the evidence of the commission?

Mr. ZECHIEL. We are.

Commissioner THOMPSON. Does the Sinclair Company wish now to introduce any evidence?

Mr. OSBORN. Will you give me just a moment to consult?

Commissioner THOMPSON. Yes. Does any other respondent wish to introduce any evidence at this time?

(No response.)

Mr. OSBORN (after consultation). I think we have no testimony to offer.

Mr. ZECHIEL. I desire to offer in evidence a telegram dated Dubuque, Iowa, September 24, 1919, addressed to the Federal Trade Commission, Huston Thompson, commissioner, Washington, D. C., and signed by W. E. Williams for the Iowa Oil Company.

(The telegram referred to was received in evidence, marked "Commission's Exhibit No. 2.")

I also offer in evidence acknowledgment of receipt of notice of taking of testimony, dated the 10th of September, 1919, addressed to H. G. Whelan, attorney for the C. L. Smith Oil & Gasolene Company, and signed by H. G. Whelan.

(The acknowledgment referred to was received in evidence, marked "Commission's Exhibit No. 3.")

I also offer in evidence acknowledgment of receipt of notice of the taking of testimony, addressed to White and Case, attorneys for the Oklahoma Producing and Refining Corporation of America, signed by White and Case.

(The acknowledgment referred to was received in evidence, marked "Commission's Exhibit No. 4."

Whereupon, at 12.30 o'clock p. m., the commission adjourned subject to notice.)

Federal Trade Commission. Docket No. 334. Section V. Copy of stipulation.

United States of America,
Before Federal Trade Commission, ss:

FEDERAL TRADE COMMISSION
vs.
SINCLAIR REFINING COMPANY. } Docket No. 334.

Stipulation.

Subject to the approval of the Federal Trade Commission, and for the purpose of this proceeding only, it is hereby agreed by the counsel for the commission and counsel for respondent, that this stipulation of facts, as to the facts herein stipulated, shall stand in lieu of testimony the same as though testified to by competent witnesses and if approved by the commission shall be and constitute evidence in the case; and it is further stipulated that on the pleadings and this stipulation as to the facts and upon any other evidence introduced, the Federal Trade Commission may proceed to make its findings and order, respondent to have opportunity for oral argument and presentation of written briefs under the direction of the commission.

PARAGRAPH ONE. That the respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maine, with its principal business office located at the city of Chicago, in the State of Illinois, and is now and has been engaged in the business of purchasing and selling refined oil and gasoline, hereinafter referred to as products, and is largely engaged in refining crude petroleum, and that it is now and has been since January 3, 1917, in connection with the aforementioned business, engaged in the leasing and loaning, but not in the manufacture, of oil pumps, storage tanks and containers and their equipments, hereinafter referred to as devices, in various States of the United States, but not in the District of Columbia, in competition with numerous other persons, firms, corporations, and copartnerships similarly engaged; that prior to the 25th day of January, 1917, the corporate name of respondent was the Cudahy Refining Company.

PARAGRAPH TWO. That the respondent, in the conduct of its business, as aforesaid, and as hereinafter more particularly described, extensively refines petroleum and its products and purchases refined oil and gasoline, all hereinafter referred to as "products," and also purchases oil pumps, storage tanks or containers, hereinafter referred to as "devices," the said devices being used to contain said products, the said products and devices then

being handled and stored in the various States of the United States and transported in interstate commerce; that the aforesaid products are sold and the aforesaid devices are leased or loaned by respondent to various persons, firms, corporations, and copartnerships; that in the conduct of its business of purchasing and selling such products and selling, leasing or loaning such devices, the same are constantly moved from one State to another by respondent, and there is conducted by respondent a constant current of trade in such products and devices between various States of the United States; that there are numerous competitors of respondent, who, in the conduct of their business in competition with respondent, purchase similar products and purchase and manufacture similar devices, the said devices being used to contain said products, the said products and devices then being handled and stored in the various States of the United States and transported in interstate commerce; that the aforesaid products are sold and the aforesaid devices sold, leased or loaned by such competitors of respondent to various persons, firms, corporations, and copartnership; that in the conduct of their business, as aforesaid, competitors of respondent constantly move such products and devices from one State to another and there is conducted by said competitors a constant current of trade in such products and devices between the various States of the United States; that respondent has conducted its said businesses in a similar manner to that above described since January 25, 1917.

PARAGRAPH THREE. That respondent now leases and loans and has for the period of its business existence, leased and loaned devices and equipments for storing and handling its products, and that the monetary considerations received by respondent do not represent reasonable returns upon the investment in such devices and equipments; and also that such leases and loans of said devices and equipments are made for monetary considerations below the cost of purchasing and vending the same, when the business of leasing or loaning said devices and equipments and the returns received thereon are considered separate and apart from the general business and sales policy of the respondent; that respondent's form of con-
171 tract with the users of such devices and equipments provides in substance that the devices and equipments shall be used for the sole purpose of storing and handling gasoline supplied by respondent, and *and* that the uniform contract used by respondent for leasing such devices and equipments is in form, tenor, and substance as follows:

"Sinclair Refining Company

"Equipment Contract.

"This agreement, made and entered into this _____ day of _____, 19__, between the Sinclair Refining Company of _____ party of the first part, _____ of the city of _____, State of _____ party of the second part, witnesseth:

"Whereas, party of the second part is now being supplied with gasoline by the party of the first part and desires to install on his premises situated at _____ the following equipment for the better storing and handling of such gasoline: _____

"Now, therefore, in consideration of the premises and of the sum of one dollar by the party of the second part to the party of the first part (the receipt of which is hereby acknowledged), the above named parties do hereby agree as follows:

"1. The above described equipment shall be used by party of the second part for the sole purpose of storing and handling the gasoline supplied by party of the first part.

"2. The party of the second part agrees, at his own cost, to maintain said equipment in good condition and repair so long as he shall continue to use same.

"3. The party of the second part agrees that he will not encumber or remove said equipment, or do or suffer to be done anything whereby said equipment or any part thereof may be seized, taken on execution, attached, destroyed or injured, or by which the title of the party of the first part thereto may in any way be altered, destroyed, or prejudiced.

"4. In the event party of the second part should at any time use said equipment for any other purpose than the storing and handling of gasoline supplied by the party of the first part, or should cease for _____ days to handle gasoline secured from the party of the first part the right or license of the party of the second part to said equipment shall at once terminate, and thereupon party of the first part shall have the right to enter upon said premises and remove said equipment and every part thereof.

"5. The party of the second part shall indemnify and save harmless the party of the first part of and from any liability for loss, damage, injury, or other casualty to persons or property caused or occasioned by any leakage, fire or explosion of gasoline stored in said tank or drawn through said pump.

"6. This agreement shall terminate forthwith upon the sale or other disposition of said premises by party of the second part, and in any event upon the expiration of _____ months from the date hereof; and in the event that by mutual consent said equipment remains in the possession of party of the second part at the expiration of said period, it is agreed that the same shall be used by party of the second part subject to all of the terms and conditions of this agreement, and such may be terminated at any time after the expiration of _____ months from the date hereof by the party of the first part giving ten days' notice to that effect. Upon the termination of this license by whatever means effected, the party of the first part shall have the right to enter upon said premises and remove the said equipment and each and every part therof; provided, however, that the party of the second part shall have the right and option at such time to purchase said equipment by paying therefor the sum of _____.

"This contract is executed in triplicate, and it is agreed that the contract held by the party of the first part is to be considered the original and to be the binding agreement in case the duplicate varies from it in any particular.

"In witness thereof, the parties hereto have caused this agreement to be executed the day and year first above written.

"SINCLAIR REFINING COMPANY,

"By ----------

"*Party of First Part.*

"----------

"*Party of Second Part.*

"----------"

173 That the average life of said contract is not less than six months and in many instances is more than one year; that the average cost to the respondent of furnishing and installing the equipments furnished to customers under the contract herein set forth is approximately $300; that in some instances only the tank is furnished the customers; that in some instances only the pump is furnished, but that in the majority of cases both tank and pump with their equipments are furnished under the contracts aforesaid; that the respondent in the conduct of its business as aforesaid sells and distributes refined oil and gasoline in eighteen States of the United States as follows: Arkansas, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New York, New Mexico, Ohio, Oklahoma, Rhode Island, and South Dakota; and that in each of said States, except Arkansas and New Mexico, the respondent leases and distributes the pumps, tanks, and devices, aforesaid, under the form of contract set forth herein; that the aggregate number of such contracts covering either pumps or tanks or both pumps and tanks, in force and effect of the time of this stipulation, in 459. That the respondent has invested in devices furnished to customers under the terms of the contract herein set forth approximately $127,000, exclusive of the cost of installation. With respect to the matters and things referred to in Sub-division E of Paragraph 4 of respondent's answer to the first count of the complaint herein, respondent rests upon the statements, averments, and denials of said Sub-division E of said Paragraph 4.

(Signed) ROY T. OSBORN,
Attorney for Respondent.

(Signed) CLAUDE R. PORTER,
Chief Counsel for Federal Trade Commission.

Federal Trade Commission. Docket No. 334. Section VI. Copy of commission's report, containing findings as to the facts and conclusions. Dated October 14, 1919.

174 UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 14th day of October, A. D. 1919.

FEDERAL TRADE COMMISSION
vs.
SINCLAIR REFINING COMPANY. } Docket No. 334.

Report, Findings, and Conclusions.

A complaint having been issued by the Federal Trade Commission in the above-entitled proceeding and the respondent therein named having filed its answer herein, and the attorneys for the respective parties in said cause having stipulated to submit, and having submitted to the commission, subject to its approval, an agreed statement of facts in said cause, which agreed statement was agreed should be taken in lieu of testimony as to those facts stipulated, and it having been agreed that as to other facts the evidence to be taken in a formal hearing was to become the evidence as to such other facts as were charged in the complaint herein or made a defense in the answer, and the commission having duly appointed a time and place for the taking of testimony, and the respondent having appeared by counsel at the time and place so designated, and the commission having duly heard evidence on behalf of the commission and respondent, and the respondent having filed a brief by its attorney, and the commission having given due consideration to the complaint and answer herein and the stipulation as to the facts and the evidence submitted by the commission and by the respondent and being fully advised in the premises, reports and finds as follows:

1. That the respondent is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maine, with its principal business office located at the city of Chicago, in the State of Illinois, and is now and has been engaged in the business of purchasing and selling refined oil and gasoline, hereinafter referred to as products, and is largely engaged in refining crude petroleum, and

175 that it is now and has been since January 25, 1917, in connection with the aforementioned business, engaged in the leasing and loaning, but not in the manufacture, of oil pumps, storage tanks, and containers and their equipment, hereinafter referred to as devices, in various States of the United States, but not in the District of Columbia, in competition with numerous other persons, firms, corporations, and copartnerships similarly engaged; that prior to the 25th day of January, 1917, the corporate name of respondent was the Cudahy Refining Company.

2. That the respondent, in the conduct of its business, as aforesaid, and as hereinafter more particularly described, extensively refines petroleum and its products and purchases refined oil and gasoline, all hereinafter referred to as "products," and also purchases all pumps, storage tanks, or containers, hereinafter referred to as "devices," the said devices being used to contain said products, the said products and devices then being handled and stored in the various States of the United States and transported in interstate commerce; that the aforesaid products are sold and the aforesaid devices are leased or loaned by respondent to various persons, firms, corporations, and copartnerships; that in the conduct of its business of purchasing and selling such products and selling, leasing, or loaning such devices, the same are constantly moved from one State to another by respondent and there is conducted by respondent a constant current of trade in such products and devices between various States of the United States; that there are numerous competitors of respondent, who, in the conduct of their business in competition with respondent, purchase similar products and purchase and manufacture similar devices, the said devices being used to contain said products, the said products and devices then being handled and stored in the various States of the United States and transported in interstate commerce; that the aforesaid products are sold and the aforesaid devices sold, leased, or loaned by such competitor of respondent to various persons, firms, corporations, and copartnerships, that in the conduct of their business, as aforesaid, competitors of respondent constantly move such products and devices from one State to another and there is conducted by said competitors a constant current of trade in such products and devices between the various States of the United States; that respondent has conducted its said businesses in a similar manner to that above described since January 25, 1917.

3. That respondent now leases and loans and has for the
176 period of its business existence, leased and loaned devices and equipment for storing and handling its products, and that the monetary considerations received by respondent do not represent reasonable returns upon the investment in such devices and equipment; and also that such leases and loans of said devices and equipment are made for monetary considerations below the cost of purchasing and vending the same, when the business of leasing or loaning said devices and equipment and the returns received thereon are considered separate and apart from the general business and sales policy of the respondent; that respondent's form of contract with the users of such devices and equipment provides in substance that the devices and equipment shall be used for the sole purpose of storing and handling gasoline supplied by respondent, and that the uniform contract used by respondent for leasing such devices and equipment is in form, tenor, and substance as follows:

"Sinclair Refining Company.

"Equipment Contract.

"This agreement, made and entered into this_____day of _____, 19__, between Sinclair Refining Company of _____, party of the first part, and _____ of the city of_____, State of _____, party of the second part, witnesseth:

"Whereas, party of the second part is now being supplied with gasoline by the party of the first part and desires to install on his premises situated at _____ the following equipment for the better storing and handling of such gasoline:_____

"Now, therefore, in consideration of the premises and of the sum of one dollar by the party of the second part to the party of the first part (the receipt of which is hereby acknowledged), the above named parties do hereby agree as follows:

"1. The above described equipment shall be used by party of the second part for the sole purpose of storing and handling the gasoline supplied by party of the first part.

"2. The party of the second part agrees, at his own cost, to maintain said equipment in good condition and repair so long as he shall continue to use same.

"3. The party of the second part agrees that he will not encumber or remove said equipment, or do or suffer to be done anything whereby said equipment or any part thereof may be seized, taken on execution, attached, destroyed or injured, or by which the title of the party of the first part thereto may in any way be altered, destroyed or prejudiced.

"4. In the event party of the second part should at any time use said equipment for any other purpose than the storing and handling of gasolene supplied by the party of the first part, or should cease for _____ days to handle gasolene secured from the party of the first part the right or license of the party of the second part to said equipment shall at once terminate, and thereupon party of the first part shall have the right to enter upon said premises and remove said equipment and every part thereof.

"5. The party of the second part shall indemnify and save harmless the party of the first part of and from any liability for loss, damage, injury, or other casualty to persons or property caused or occasioned by any leakage, fire, or explosion of gasolene stored in said tank or drawn through said pump.

"6. This agreement shall terminate forthwith upon the sale or other disposition of said promises by party of the second part, and in any event upon the expiration of _____ months from the date hereof; and in the event that by mutual consent said equipment remains in the possession of party of the second part at the expiration of said period, it is agreed that the same shall be used by party of the second part subject to all of the terms and conditions of this agreement, and such may be terminated at any time after the ex-

piration of _____ months from the date hereof by the party o
the first part giving ten days' notice to that effect. Upon the termi
nation of this license by whatever means effected, the party of th
first part shall have the right to enter upon said premises and re
move the said equipment and each and every part thereof: provide
however, that the party of the second part shall have the right an
option at such time to purchase said equipment by paying thereto
the sum of _____.

"This contract is executed in triplicate, and it is agreed that th
contract held by the party of the first part is to be con
178 sidered the original and to be the binding agreement in cas
the duplicate varies from it in any particular.

"In witness whereof, the parties hereto have caused this agree
ment to be executed the day and year first above written.

"SINCLAIR REFINING COMPANY,

"By _____

"*Party of First Part.*

"_____

"*Party of Second Part.*

"_____"

4. That the contracts mentioned in the preceding paragraph
also provide that such equipments shall be used by the lessee only fo
the purpose of holding and storing the respondent's petroleu
products; that a small proportion of such lessees handle simila
products of respondent's competitors; and that only a small pro
portion of such lessees as handle similar products of respondent
competitors require or use more than a single pump outfit in th
conduct of their said business; that the practice of leasing suc
devices requires a large capital investment; that many competitors o
respondent do not possess sufficient capital and are not able to pu
chase and lease devices as respondent does as aforesaid, partly b
reason of which such competitors have lost numerous customers t
respondent; that the effect of the practice of leasing by contra
such equipments, where such contracts contain the said provisio
restricting the use of the same to the storage and handling o
respondent's products as aforesaid, may be to substantially lesse
competition and tend to create for the respondent a monopoly in
the business of selling petroleum products.

Conclusions.

That the methods of competition and the business practices se
forth in the foregoing findings as to the facts are, under the cir
cumstances set forth therein, unfair methods of competition, in in
terstate commerce, in violation of the provisions of section 5 of
an act of Congress, approved September 26, 1914, entitled "An ac
to create a Federal Trade Commission, to define its powers an
duties, and for other purposes" and are in violation of section

of an act of Congress approved October 15, 1914, entitled "An
179 act to supplement existing laws against unlawful restraints and monopolies, and for other purposes."

[SEAL.] (Signed) VICTOR MURDOCK,
Acting Chairman.
HUSTON THOMPSON,
WILLIAM B. COLVER,
Commissioners.

Dated this 14th day of October, A. D. 1919.

Federal Trade Commission. Docket No. 334. Section VII. Copy of commission's order to cease and desist, dated October 14, 1919.

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 14th day of October, A. D. 1919.

FEDERAL TRADE COMMISSION,
v.
SINCLAIR REFINING COMPANY. } Docket No. 334.

Order to cease and desist.

A complaint having been issued by the Federal Trade Commission in the above-entitled proceeding and the respondent therein named having filed its answer herein, and the attorneys for the respective parties in said cause having stipulated to submit, and having submitted to the commission, subject to its approval, an agreed statement of facts in said cause which agreed statement was agreed should be taken in lieu of testimony as to those facts stipulated, and it having been agreed that as to other facts the evidence to be taken in a formal hearing was to become the evidence as to such other facts as were charged in the complaint herein or made a defense in the answer, and the commission having duly appointed a time and place for the taking of testimony, and the respondent having appeared by counsel at the time and place so designated, and the commission having
180 duly heard evidence on behalf of the commission and respondent, and the respondent having filed a brief by its attorney, and the commission having given due consideration to the complaint and answer herein and the stipulation as to the facts and the evidence submitted by the commission and by the respondent and being fully advised in the premises reports and finds as follows: That having made its report and findings as elsewhere set forth, and having concluded upon such report and findings that the respondent has been guilty of unfair methods of competition in interstate commerce in violation of section 5 of an act of Congress, approved September 26,

1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and that the respondent has violated section 3 of an act of Congress, approved October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," which report, findings and conclusions are hereby referred to and made a part hereof:

Now, therefore, it is ordered, that respondent, Sinclair Refining Company, shall cease and desist from:

1. Directly or indirectly leasing pumps or tanks or both and their equipments for storing and handling petroleum products in the furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of the same after making due allowance for depreciation and other items usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom, and from doing any matter or thing which would have the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made.

2. Entering into contracts or agreements with dealers of its petroleum products or from continuing to operate under any contract or agreement already entered into whereby such dealers agree or have an understanding that as a consideration for the leasing to them of such pumps and tanks and their equipments the same shall be used only for storing or handling the products of respondent, and from doing anything having the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made.

Provided, however, that as to such pumps and tanks and equipments as are now leased by respondent contrary to the orders
181 contained in paragraphs 1 and 2 herein, respondent shall have four months from the date hereof to enter into new contracts or agreements with respect to the same which shall not be incompatible with the spirit and intent of this order.

It is also ordered, under and by virtue of the authority conferred on the commission by paragraph B of section 6 of "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, that the said Sinclair Refining Company, respondent, shall within 20 days after the expiration of the time allowed within which respondent shall have fully complied with the order to cease and desist, hereinabove set forth, report in writing to the Federal Trade Commission, fully setting forth the nature of the changes made in the conduct of its business with respect to the subject matter involved in the order to cease and desist, and shall be set forth in such report in complete detail the plan or plans adopted for the lease, loan, gift, or sale of any oil tanks and pumps for use in storing refined oil or gasoline, which plan or plans are in use or are proposed to be put in use, and also attach to such report any contracts used by the respondent in the conduct of such business.

Done at Washington, D. C., this 14th day of October, A. D., 1919.
By the Commission:
[SEAL.] (Signed) J. P. YODER,
Secretary.

Federal Trade Commission. Docket No. 334. Section VIII. Copy of respondent's motion for rehearing and review and to set aside order to cease and desist. (Dated February 11, 1920.)

182 UNITED STATES OF AMERICA.
Before Federal Trade Commission.

FEDERAL TRADE COMMISSION
v.
SINCLAIR REFINING COMPANY. } Docket No. 334.

Motion for rehearing and review and to set aside order to cease and desist.

Comes now the respondent, Sinclair Refining Company a Maine corporation, and for the following reasons and on the following grounds respectfully moves the Honorable the Federal Trade Commission as follows:

A. For a rehearing of said cause.
B. For a review of the order to cease and desist.
C. That the order to cease and desist be set aside.
And in support thereof respectfully shows:

Statement.

July 18, A. D. 1919, the commission caused a complaint to be issued against the respondent alleging in substance that the respondent's method and practice of leasing and loaning oil pumps and storage tanks or containers was in violation of section 5 of an act of Congress approved September 26, 1914, and section 3 of an act of Congress approved October 15, 1914. Within the time prescribed by the commission the respondent filed its answer to said complaint denying generally and specifically the allegations of the complaint charging violations of the sections of the statutes referred to. The case was heard by the commission in the City of Washington, D. C., on September 26, 27, and 29, 1919. Thereafter and on October 14, 1919, the commission issued an order to cease and desist directed to respondent wherein the commission made certain findings and conclusions, on which said order was based.

Respondent's reasons and grounds in support of motion.

1. The findings, conclusions and order of the commission are:
   (*a*) Not supported by the evidence.
   (*b*) Contrary to the evidence.
   (*c*) Contrary to law.

183 2. There is insufficient evidence to support the finding, and the commission erred in finding that in the handling of oil pumps and storage tanks or containers there is conducted by respondent a constant current of trade between various States of the United States and a transportation by respondent of said devices in interstate commerce.

3. It is immaterial to the issues of this cause, and it was error for the commission to find that respondent leases and loans and has leased and loaned devices and equipment for storing and handling its products at and for monetary considerations below the cost of purchasing and vending the same, when the business of leasing or loaning said devices and equipment and the return received thereon are considered separate and apart from the general business and sales policy of the respondent.

4. It is immaterial to the issues of this cause, and it was error for the commission to find:

(a) That respondent's form of contract set forth in said order provides that respondent's pumps, tanks or containers, and other equipment shall be used by the lessee only for the purpose of holding and storing respondent's petroleum products.

(b) That a small proportion of respondent's lessees handle similar products of respondent's competitors.

(c) That only a small proportion of such lessees as handle similar products of respondent's competitors require or use more than a single pump outfit in the conduct of their business.

(d) That the practice of leasing said devices requires a large capital investment.

(e) That many competitors of respondent do not possess sufficient capital and are not able to purchase or lease devices as respondent does, partly by reason of which such competitors have lost numerous customers to respondent.

5. There is insufficient evidence to support the finding, and the commission erred in finding that the effect of the practice of leasing by contract such equipment, where such contract contains a provision restricting the use of the same to the storage and handling of respondent's products, may be to substantially lessen competition and tend to create for the respondent a monopoly in the business of selling petroleum products.

6. There is insufficient evidence to support the commission's
184 finding and conclusion that the methods of competition and the business practices set forth in the commission's findings as to the facts are unfair methods of competition in interstate commerce; and the commission erred in finding that the same are unlawful.

7. The commission erred generally in making and issuing herein its order to cease and desist directed to the respondent, and it erred specifically in ordering respondent:

(a) To discontinue leasing pumps or tanks, or both, and their equipment for storing and handling petroleum products in the fur-

therance of respondent's petroleum business at a nominal rental, or at a rental that does not yield a monetary profit, when considered separate and apart from the general business and sales policy of respondent.

(b) To not enter into contracts or agreements, and to discontinue operating under any contract or agreement already entered into, whereby the lessees agree or have an understanding that the pumps and tanks and their equipment shall be used only for storing and handling of products of respondent.

8. The commission is without jurisdiction over the subject matter of said complaint and order.

9. The order of the commission is contrary to law, is inequitable, and unjust:

(a) The commission is without jurisdiction to make said order.

(b) Said order is not uniform in its application or effect, and works a preference for those against whom an order has not been made and for those over whom the commission has not sought to exercise its jurisdiction.

(c) The order of the commission tends to restrain and restrict trade, restrict competition, and produce a monopoly.

(d) The order of the commission is against public interest.

10. The commission erred in assuming that the proceeding herein would be to the interest of the public.

11. The commission erred in issuing and promulgating its order herein against respondent until it had heard and determined all the causes of like character pending before the commission.

Respondent therefore respectfully moves the commission that it be granted a rehearing in this cause; that the commission review said cause and its order herein; and that the commission set aside its said order to cease and desist.

185 Respondent also prays that it may be given opportunity to be heard on this motion, either orally or by written brief, or both; and that in the interim said order to cease and desist, and the operation and effect thereof, be suspended.

Dated at Chicago, Illinois, this 11th day of February, 1920.

(Signed) EDW. H. CHANDLER,
Tulsa, Oklahoma.
ROY T. OSBORN,
111 West Washington St., Chicago, Ill.
W. RAY ALLEN,
111 West Washington St., Chicago, Ill.
Attorneys for the Respondent, Sinclair Refining Company.

TO THE SECRETARY,
Federal Trade Commission:

Please direct all communications to Roy T. Osborn, counsel, Sinclair Refining Company, 111 West Washington St., Chicago, Illinois.

Federal Trade Commission. Docket No. 334. Section IX. Copy of respondent's motion to suspend order to cease and desist. Dated February 11, 1920.

UNITED STATES OF AMERICA,
Before Federal Trade Commission:

FEDERAL TRADE COMMISSION
v.
SINCLAIR REFINING COMPANY. } Docket No. 334.

Motion to suspend order to cease and desist.

Comes now the respondent, Sinclair Refining Company, a Maine corporation, and for the following reasons and on the following grounds respectfully moves the honorable the Federal Trade Commission for an order suspending the commission's order to cease and desist, heretofore made and entered herein:

186 1. The respondent has filed herein motion praying that the commission grant a rehearing in this proceeding and upon such rehearing review and set aside its said order to cease and desist. Respondent respectfully submits that pending the hearing and consideration of such motion the operation of said order be suspended by the commission.

2. The contracts of the respondent, which were the subject of the complaint herein, are approximately five hundred (500) in number and are distributed over approximately sixteen (16) different States. In operating under said contracts the respondent encounters numerous competitors, some of which are without the jurisdiction of the commission, and others against which the commission has made no order to cease and desist.

3. The order to cease and desist was made and entered October 14, 1919. Respondent in good faith prepared a form of contract which it regarded as being in strict compliance with said order to cease and desist, and which it proposed to substitute for those contracts which were the subject of the commission's complaint. Though not required so to do, respondent on November 21, 1919, formally submitted to the commission respondent's said new form of contract and requested an opinion from the commission approving the form so submitted. The commission thereupon took the same under advisement.

4. Said order to cease and desist allowed respondent four (4) months from the date thereof to enter into new contracts or agreements in compliance therewith and respondent proceeded in good faith to secure the cancellation of existing contracts with those holding its pumps and equipment and to substitute therefor contracts upon the form submitted to the commission upon a rental basis representing a reasonable profit upon the fair value of such equipment and upon the cost of the installation thereof, and respondent has succeeded in securing the cancellation of a number of such original contracts and the execution of new contracts on the form submitted to the commission and on the rental basis hereinabove specified.

5. Respondent is in receipt of a communication from the Honorable Claude R. Porter, chief counsel for the commission, dated January 17, 1920, advising that in the judgment of the commission the contract as submitted is not free from objections, and is open to some of the same objections as were recently determined
187 by the commission to apply to the contracts heretofore used by the respondent, but such communication does not specify wherein the form of contract submitted is not in accordance with the requirements of the said order.

6. The commission having indicated that respondent's submitted contract is objectionable, and respondent having presented to the commission a motion for a rehearing and review of the above-entitled cause, respondent respectfully represents that the commission should suspend its order to cease and desist pending a consideration of such motion to review.

7. Upon information and belief respondent states as follows:

A. Complaints were issued by the commission against many of respondent's competitors on or about the date complaint was issued against respondent, to wit, July 18, 1919.

B. In many of these causes no order to cease and desist has been issued, although such order has issued against respondent.

C. Regardless of the order so issued, and notwithstanding the complaints filed against them, some of respondent's competitors, against which no order has yet issued, continue to engage in the business of leasing and loaning equipment in manner and form complained of by the commission.

8. The conditions set forth in subdivision 7 hereof place respondent on an inequality with its competitors and deprive it of commercial opportunities and priviieges enjoyed by them, both as to old and new business. It is insisted this situation should not obtain.

Dated at Chicago, Illinois, this 11th day of February, 1920.

(Signed) EDW. H. CHANDLER,
Tulsa, Oklahoma,
ROY T. OSBORN,
111 West Washington Street, Chicago, Illinois,
W. RAY ALLEN,
111 West Washington Street, Chicago, Illinois,
Attorneys for the Respondent, Sinclair Refining Company.

TO THE SECRETARY,
Federal Trade Commission:

Please direct all communications to Roy T. Osborn, counsel, Sinclair Refining Company, 111 West Washington Street, Chicago, Illinois.

188 Federal Trade Commission. Docket No. 334. Section X. Copy of respondent's application for extension of time to comply with order to cease and desist. Dated March 2, 1920.

UNITED STATES OF AMERICA,
Before Federal Trade Commission:

FEDERAL TRADE COMMISSION *vs.* SINCLAIR REFINING COMPANY.	Docket No. 334.

Application for extension of time to comply with order to cease and desist.

Comes now the respondent, Sinclair Refining Company, a Maine corporation, and for the following reasons and on the following grounds respectfully moves the honorable the Federal Trade Commission as follows:

1. October 14, 1919, the commission made an order in the above-entitled cause directing respondent to cease and desist. As to pumps and tanks and equipment as were then leased by respondent contrary to the findings and order of the commission, the respondent was granted four months from the date of said order to enter into new contracts or agreements with respect to the same, and within twenty days after the expiration of said four months' period respondent was by said order required to report in writing to the commission fully setting forth the nature of the changes made in the conduct of its business with respect to the subject matter involved in said order.

2. It is a matter of evidence in this cause that respondent's contracts, which were the subject of the complaint herein, are approximately five hundred (500) in number and are distributed over approximately sixteen (16) different States.

3. It has proven a physical impossibility for respondent to
189 comply fully and completely with the order of the commission in respect to all of respondent's said contracts, although it has done so with a large percentage thereof.

4. Respondent has filed herein a motion for an order of the commission suspending the commission's said order to cease and desist.

5. Respondent has filed herein a motion praying that the commission grant a rehearing in this proceeding, and upon such rehearing that it review and set aside its said order to cease and desist.

Respondent therefore respectfully moves the commission that it be relieved from making and filing the report required by said order within said twenty-day period immediately succeeding the four months extending from and after October 14, 1919, pending action

by the commission on respondent's said motions referred to in subdivisions Nos. 4 and 5 hereof.

Dated at Chicago, Illinois, this 2nd day of March, 1920.

(Signed) EDW. H. CHANDLER,
Tulsa, Oklahoma,
ROY T. OSBORN,
111 West Washington St., Chicago, Illinois,
W. RAY ALLEN,
111 West Washington St., Chicago, Illinois,
Attorneys for the Respondent Sinclair Refining Company.

To the SECRETARY,
Federal Trade Commission:

Please direct all communications to Roy T. Osborn, counsel, Sinclair Refining Company, 111 West Washington St., Chicago, Ill.

Federal Trade Commission. Docket No. 334. Section XI. Copy of commission's order denying motion of respondent for a rehearing and review and to set aside order to cease and desist. Dated March 17, 1920.

[90] UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 17th day of March, A. D. 1920.

Present: Victor Murdock (chairman), Huston Thompson, William B. Colver, Nelson B. Gaskill, Jno. Garland Pollard, commissioners.

FEDERAL TRADE COMMISSION
vs.
SINCLAIR REFINING COMPANY. } Docket No. 334.

Whereas the above respondent, Sinclair Refining Company, did on March 6th, 1920, by its attorneys, Edward H. Chandler, Roy T. Osborn, and W. Ray Allen, file a written motion for a rehearing and review of this case and to set aside the order to cease and desist herein, dated the 14th day of October, A. D. 1919; and

Whereas, upon consideration of the whole record, no good and sufficient reason appears why the said motion should be granted; it is therefore

Ordered, on this 17th day of March, A. D. 1920, that the motion of the respondent for a rehearing and review and to set aside the said order to cease and desist be, and the same is hereby, denied.

By the commission:

[SEAL.] J. P. YODER, *Secretary.*

Federal Trade Commission. Docket No. 334. Section XII. Co
of commission's order denying motion of respondent to suspe
order to cease and desist. Dated March 17, 1920.

191 UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

At a regular session of the Federal Trade Commission, held at
office in the city of Washington, D. C., on the 17th day of Mar
A. D. 1920.

Present: Victor Murdock (chairman), Huston Thompson, Willi
B. Colver, Nelson B. Gaskill, Jno. Garland Pollard, commissioners

FEDERAL TRADE COMMISSION
vs.
SINCLAIR REFINING COMPANY. } Docket No. 334.

Whereas the above respondent, Sinclair Refining Company, did
March 6th, 1920, by its attorneys, Edward H. Chandler, Roy
Osborn, and W. Ray Allen, file a written motion to suspend t
order to cease and desist herein, dated the 14th day of Octob
A. D. 1919; and

Whereas, upon consideration of the whole record, no good a
sufficient reason appears why the said order to cease and des
should be suspended: it is therefore

Ordered, on this 17th day of March, A. D. 1920, that the moti
of the respondent to suspend the said order to cease and desist b
and the same is hereby denied.

By the commission:

[SEAL.] J. P. YODER, *Secretary.*

Federal Trade Commission. Docket No. 334. Section XIII. Co
of commission's order granting respondent an extension of time
which to comply with order to cease and desist. Dated March
1920.

192 UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

At a regular session of the Federal Trade Commission, held at t
office in the city of Washington, D. C., on the 17th day of Marc
A. D. 1920.

Present: Victor Murdock (chairman), Huston Thompson, Willia
B. Colver, Nelson B. Gaskill, Jno. Garland Pollard, commissioners.

FEDERAL TRADE COMMISSION
vs.
SINCLAIR REFINING COMPANY. } Docket No. 334.

Whereas the above respondent, Sinclair Refining Company, di
on March 6th, 1920, by its attorneys, Edward H. Chandler, Roy

sborn, and W. Ray Allen, file a written motion for extension of me to comply with the order to cease and desist herein, dated the th day of October, 1919; and

Whereas, in and by said order to cease and desist, the respondent as allowed four months from the date of said order, namely, the th day of October, A. D. 1919, in which to enter into new contracts agreements, and was further directed to file a report in writing thin 20 days after the expiration of the time allowed in which id respondent should comply with said order to cease and desist; nd

Whereas, upon consideration of the whole record, good reasons ppear why the extension applied for should be granted; it is there-ore

Ordered, that the said motion be and the same hereby is granted, nd the respondent's time to make and file the report required by id order to cease and desist be, and the same hereby is, extended or 60 days from the 5th day of March, A. D. 1920.

By the commission:

[SEAL.] J. P. YODER, *Secretary.*

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court f Appeals for the Seventh Circuit, do hereby certify that the fore-oing printed pages, numbered from 1 to 192, inclusive, contain a true opy of the printed original petition to review order of Federal Trade ommission and the proceedings before the Federal Trade Commis-ion, printed under my supervision and filed November 19, 1920, on hich this case was heard and determined, and the order entered on lay 3rd, 1920, authorizing the filing and service of petition to re-iew order of Federal Trade Commission, in the case of Sinclair Re-ining Company, a corporation, petitioner, vs. Federal Trade Com-ission, respondent, No. 2838, October Term, 1919, as the same re-ains upon the files and records of the United States Circuit Court f Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the al of said United States Circuit Court of Appeals for the Seventh ircuit, at the City of Chicago, this thirteenth day of October A. D. 21.

[SEAL.] EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh District.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United tates court room in the city of Chicago in said Seventh Circuit on e seventh day of October, 1919, of the October term in the year of ur Lord one thousand nine hundred and nineteen and of our Inde-ndence the one hundred and forty-fourth.

And afterwards, to wit, on the third day of May, 1920, in t October term aforesaid, an order was entered authorizing the fil and service of a petition to review order of Federal Trade Comm sion, which said order is not copied here nor made a part of t transcript, as the same appears on page one of the printed ori nal petition to review order of Federal Trade Commission, etc., c tified herewith.

And afterwards, on the same day, to wit, on the third day of Ma 1920, in the October term aforesaid, there was filed in the office of t clerk of this court a certain petition to review order of Federal Tra Commission, which said petition is not copied here nor made a pa of this transcript, as the same appears on page two (2) of the print original petition to review order of Federal Trade Commission, et certified herewith.

And afterwards, to wit, on the tenth day of May, 1920, in the Oc ber term last aforesaid, there was filed in the office of the clerk this court a certain acceptance of service of petition and of ord which said acceptance is in the words and figures following, to w

195 In the United States Circuit Court of Appeals for the Seve Circuit.

SINCLAIR REFINING COMPANY, A CORPORATION, PETITIONER,
vs
FEDERAL TRADE COMMISSION, RESPONDENT. } No. 28

Acceptance of service of petition and of order.

Federal Trade Commission, respondent, hereby accepts service a acknowledges receipt of a certified copy of petition to review or of Federal Trade Commission in the above styled and numbe proceeding, together with order bearing date May 3rd, 1920, a thorizing the filing of said petition and the service thereof up respondent, and directing respondent to forthwith file in said co a transcript of the record in a cause pending before respond styled, "Federal Trade Commission v. Sinclair Refining Compan bearing docket No. 334.

Dated at Washington, District of Columbia, this sixth day May, 1920.

FEDERAL TRADE COMMISSION,
By CLAUDE R. PORTER,
Chief Counsel.

(Endorsed:) Filed May 10, 1920. Edward M. Holloway, clerk.

At a regular term of the United States Circuit Court of Appe for the Seventh Circuit, begun and held in the United States cou room, in the city of Chicago, in said Seventh Circuit on the fifth da of October, 1920, of the October term in the year of our Lord o

usand nine hundred and twenty and of our Independence the one hundred and forty-fifth.

And afterwards, to wit, on the seventeenth day of November, 1920, in the October term last aforesaid, came the petitioner, by its counsel, Mr. Roy T. Osborn and Mr. W. Ray Allen, and filed in the office of the clerk of this court their appearance, which said appearance is in the words and figures following, to wit:

ited States Circuit Court of Appeals for the Seventh Circuit.

(October Term, 1919.)

SINCLAIR REFINING COMPANY, A CORPORATION, PETITIONER,
vs.
FEDERAL TRADE COMMISSION, RESPONDENT. } No. 2838.

The clerk will enter my appearance as counsel for the petitioner.

ROY T. OSBORN,
W. RAY ALLEN.

(Endorsed:) Filed Nov. 17, 1920. Edward M. Holloway, clerk.

And afterwards, to wit, on the twenty-fourth day of November, 20, in the October term last aforesaid, came the respondent, by its unsel, Mr. Adrien F. Busick and Mr. E. W. Burr, and filed in the ce of the clerk of this court their appearance, which said appear- e is in the words and figures following, to wit:

ited States Circuit Court of Appeals for the Seventh Circuit.

(October Term, 1920.)

SINCLAIR REFINING COMPANY, PETITIONER,
vs
EDERAL TRADE COMMISSION, RESPONDENT. } No. 2838.

The clerk will enter my appearance as counsel for the respondent.

ADRIEN F. BUSICK,
Acting Chief Counsel.
and E. W. BURR,
Attorney for Respondent.

(Endorsed:) Filed Nov. 24, 1920. Edward M. Holloway, clerk.

And afterwards, to wit, on the seventh day of December, 1920, in the October term last aforesaid, there was filed the office of the clerk of this court a certain motion of petitioner r extension of time within which to file brief, which said motion in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

SINCLAIR REFINING COMPANY, A CORPORATION, petitioner, *vs.* FEDERAL TRADE COMMISSION, RESPONDENT. } No. 2838.

Motion of petitioner for extension of time within which to file brief.

Comes now your petitioner, Sinclair Refining Company, a corporation, and respectfully states that under the rules of this court it is required to file its brief herein on or before December 10, 1920; that on December 4, 1920, it sent a telegram to the Honorable Charles R. Porter as chief counsel for the Federal Trade Commission at Washington, D. C., reading as follows:

"Our brief Sinclair Refining Company versus Federal Trade Commission number two eight three eight pending Court of Appeals Seventh Circuit required to be filed tenth inst. Will you kindly consent that court extend time at least twenty days? Please wire answer my expense care our Company, Conway Building, Chicago"—

to which it received in reply a telegram on December 6, 1920, reading as follows:

"Consent to extension of such time as you need Court of Appeals case. Porter resigned. Busick acting. (Signed) Busick."

Wherefore, your petitioner prays that it be granted an
198 extension of time to and including the 10th of January, A. D. 1921, within which to file its brief in this cause.

EDW. H. CHANDLER, *Tulsa, Oklahoma,*
ROY T. OSBORN, *Chicago, Illinois,*
W. RAY ALLEN, *Chicago, Illinois,*
Counsel for Petitioner.

STATE OF ILLINOIS,
County of Cook, ss:

Roy T. Osborn, being duly sworn, deposes and says that he is one of counsel of petitioner in the above-entitled cause; that he has read and is familiar with the matters and things set out in the above and foregoing motion, and that the same are true as he verily believes.

ROY T. OSBORN.

Subscribed and sworn to before me, a notary public, this 7th day of December, A. D. 1920.

[SEAL.] A. C. JONES, *Notary Public.*

My commission expires November 23, 1923.

(Endorsed:) Filed Dec. 7, 1920. Edward M. Holloway, clerk.

And afterwards, on the same day, to wit, on the seventh day of December, 1920, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

TUESDAY, DECEMBER 7, 1920.

Court met pursuant to adjournment.

Present: Hon. Francis E. Baker, circuit judge, presiding: Hon. Samuel Alschuler, circuit judge; Hon. George T. Page, circuit judge; Edward M. Holloway, clerk.

Before Hon. Samuel Alschuler, Circuit Judge.

SINCLAIR REFINING COMPANY
vs.
FEDERAL TRADE COMMISSION. } 2838.

Petition to review order of the Federal Trade Commission.

On motion of counsel for petitioner, counsel for respondent consenting thereto, it is ordered that the time for filing brief for respondent in this cause be, and the same is hereby extended to January 10, 1921.

And afterwards, to wit, on the twenty-fifth day of January, 1921, in the October term last aforesaid, there was filed in the office of the clerk of this court a certain motion for extension of time to file brief for respondent, which said motion is in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

SINCLAIR REFINING COMPANY, A CORPORATION, PETITIONER,
vs.
FEDERAL TRADE COMMISSION, RESPONDENT. } No. 2838.

Motion of respondent for extension of time within which to file brief.

Comes now the respondent above named, the Federal Trade Commission, and respectfully states that under the rules of this court it is required to file and serve its brief herein on or before January 30th, 1921.

That in view of the length of time required for printing the said brief of respondent through official channels as required by law and the additional time required for the course in mails, it is impracticable for respondent to comply as regards the filing and service of its brief on the date last above named.

Respondent shows further that on January 19th respondent, through its acting chief counsel, wrote to counsel for the petitioner as follows:

"The period of 20 days for the preparation of reply brief in the Seventh Circuit of the United States Circuit Court of Appeals

is very short for this commission, in view of the fact that we are obliged by law to do our printing through the Government Printing Office, which requires six days for the work.

"This office is busily engaged in the preparation of the respondent's brief in the above-entitled case, but it is practically impossible to complete and print our written argument within the time. Will you kindly consent to an extension of time for the filing of our brief of 15 days, which will bring the filing date to Monday, Feb. 14th.

"We are exceedingly anxious to submit written and oral argument in this case at the earliest practicable date and anticipate not consuming the entire 15 days additional.

"If you will kindly let us hear from you we shall take the matter up with the court."

and is to-day in receipt of telegram consenting to the proposed extension of 15 days in the following terms:

"Agreeable to petitioner that court extend respondent's time for filing brief in Sinclair versus Commission, Circuit Court of Appeals, Seventh Circuit.

"(Signed) ROY T. OSBORN."

Wherefore, the respondent prays that there be granted an extension of time to and including February 14th, 1921, within which to file its brief herein.

ADRIEN F. BUSICK,
Acting Chief Counsel, Federal Trade Commission.

201 DISTRICT OF COLUMBIA,
City of Washington, ss:

Adrien F. Busick, being duly sworn, deposes and says that he is acting chief counsel of the respondent in the above-entitled cause, that he has read and is familiar with the matters and things set out in the foregoing motion, and that the same are true as he verily believes.

ADRIEN F. BUSICK.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, city of Washington, this 21st day of January, 1921.

[SEAL.] WARREN R. CHOATE, *Notary Public.*

My commission expires April 5, 1923.

(Endorsed:) Filed Jan. 25, 1921. Edward M. Holloway, clerk.

And afterwards, on the same day, to wit, on the twenty-fifth day of January, 1921, in the October term last aforesaid, the following further proceedings were had and entered of record to wit:

TUESDAY, JANUARY 25, 1921.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Francis E. Baker, circuit judge, presiding; Hon. Samuel Alschuler, circuit judge; Hon. Evan A. Evans, circuit judge; Hon. George T. Page, circuit judge; Edward M. Holloway, clerk; John J. Bradley, marshal.

Before: Hon. Francis E. Baker, circuit judge; Hon. Samuel Alschuler, circuit judge; Hon. Evan A. Evans, circuit judge.

302 SINCLAIR REFINING COMPANY, a corporation, *vs.* FEDERAL TRADE COMMISSION. } 2838. Original petition to review an order of the Federal Trade Commission.

On application of counsel for respondent, it is ordered by the court that the time to file brief for the respondent in this cause be, and the same is hereby, extended to and including February 14, 1921.

And afterwards, to wit, on the fourteenth day of March, 1921, in the October term last aforesaid, there was filed in the office of the clerk of this court a certain petition that the cause be set for hearing, which said petition is in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

THE SINCLAIR REFINING COMPANY, PETITIONER, *v.* FEDERAL TRADE COMMISSION, RESPONDENT. } No. 2838.

Petition for advancement upon the calendar and fixing of a day certain for argument.

To the Honorable Circuit Court of Appeals:

Come now the petitioner and the respondent in the above-entitled cause by their respective counsel and show to the court as follows:

That this case is one of some twelve causes of action arising as the result of petitions for review of orders issued by the respondent to numerous corporations engaged in the gasoline business, other cases being pending in the Second, Third, and Sixth Circuits of the United States Circuit Court of Appeals;

That it is highly important to the gasoline industry that there be certainty as early as possible with regard to the legality of certain practices now in controversy and that the same counsel for the respondent will necessarily represent the Federal Trade Commis-
303 sion in all of the cases above mentioned and now pending; that the cases in the Sixth Circuit, some six in number, have been set for May 5th; that another engagement is set in this court for April 26th;

Hence it will greatly serve the convenience of counsel and expedite a settlement of the general controversy, at the same time enabling counsel for the respondent to meet all engagements, if the court

can consistently and will set the above-entitled cause for April 27 or April 28th, 1921.

That the court's attention is respectfully called to that portion of section 5 of the act of Congress approved September 26, 1914, creating a Federal Trade Commission, and relating to proceedings of the nature of the present case, which portion of the statute reads as follows:

"Such proceedings in the Circuit Court of Appeals shall be given precedence over other cases pending therein and shall be in every way expedited."

Wherefore the undersigned petition the court that hearing in the case be set for a day certain and if practicable, for April 27th or 28th.

ROY T. OSBORN,
Attorney for the Petitioner.
ADRIEN F. BUSICK,
Acting Chief Counsel for the Respondent Commission.

Dated this 12 day of March, 1921.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Adrien F. Busick, being first duly sworn, depose and say that I have read the foregoing petition, know the contents thereof of my own knowledge, and that the same is true.

ADRIEN F. BUSICK.

Subscribed and sworn to before me this 12th day of March, 19

[SEAL.] WARREN R. CHOATE,
Notary Public within and for the District of Columbia.

My commission expires April 5, 1923.

(Endorsed:) Filed Mar. 14, 1921. Edward M. Holloway, clerk.

204 And afterwards, on the same day, to wit, on the fourteenth day of March, 1921, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

MONDAY, MARCH 14, 1921.

Court met pursuant to adjournment.

Present: Hon. Francis E. Baker, circuit judge, presiding; Hon. Samuel Alschuler, circuit judge; Hon. George T. Page, circuit judge; Edward M. Holloway, clerk.

Before Hon. Francis E. Baker, presiding judge.

SINCLAIR REFINING COMPANY *vs.* FEDERAL TRADE COMMISSION.	2838. Original petition to review an order of the Federal Trade Commission.

This 14th day of March, 1921, upon verified petition on behalf of both parties hereto by their respective counsel, it appearing that

account of numerous court engagements it is highly important and will greatly minister to the convenience of counsel for the respondent that a day certain for oral argument in the above-entitled case be set and that the time when argument can be presented without undue inconvenience is limited, and it appearing further that proceedings such as the present cause are entitled to a preference on the calendar by act of Congress:

Now therefore it is hereby ordered that the above-entitled case be set for oral argument on a day certain, to wit, the 27th day of April, 1921.

And afterwards, to wit, on the twenty-seventh day of April, 1921, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

WEDNESDAY, APRIL 27, 1921.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Francis E. Baker, circuit judge, presiding; Hon. Samuel Alschuler, circuit judge; Hon. Evan A. Evans, circuit judge; Hon. George T. Page, circuit judge; Edward M. Holloway, clerk; John J. Bradley, marshal.

Before Hon. Francis E. Baker, circuit judge; Hon. Evan A. Evans, circuit judge; Hon. George T. Page, circuit judge.

SINCLAIR REFINING COMPANY, a corporation, *vs.* FEDERAL TRADE COMMISSION.	2838. Original petition to review order of Federal Trade Commission.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Roy T. Osborn, counsel for petitioner, and by Mr. Eugene W. Burr, counsel for respondent, and the court having heard the same takes this matter under advisement.

And afterwards, to wit, on the eighth day of September, 1921, in the October term last aforesaid, there was filed in the office of the clerk of this court the opinion of the court, which said opinion is in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the

Seventh Circuit.

October term, 1920, April session, 1921.

SINCLAIR REFINING COMPANY, a corporation, petitioner, *vs.* FEDERAL TRADE COMMISSION, respondent.	No. 2838. Original petition to review order of Federal Trade Commission.

Before Baker, Evans, and Page, circuit judges.

Opinion by Page, Cir. J.

This is an original petition against Federal Trade Commission, hereinafter called respondent, to review an order made in a proceeding wherein it had filed its complaint against Sinclair Refining Company, hereinafter called petitioner, the substance of which complaint was that petitioner, being engaged in the business of purchasing and selling oil and gasoline and the leasing and loaning of oil pumps, storage tanks or containers and their equipment, leased, for a nominal consideration, said oil pumps, storage tanks or containers and their equipment to persons who purchased oil from petitioner, with the understanding that the same should not be used by the lessees of the pumps and other equipment to hold or pump the oil of any competitor. It was also charged that the leases were made on consideration that lessees should not purchase or deal in the products of a competitor.

In answer to that complaint, petitioner set out the contract
207 which was found by the Federal Trade Commission to be the uniform contract by which such equipment was leased the portions of which, material here, are:

"1. The above-described equipment shall be used by party of the second part" (purchaser of gasoline) "for the sole purpose of storing and handling the gasoline supplied by party of the first part.

* * * * * * *

"6. This agreement shall terminate forthwith upon the sale or other disposition of said premises by party of the second part, and in any event upon the expiration of ------ months from the date hereof; * * * provided, however, that the party of the second part shall have the right and option at such time to purchase said equipment by paying therefor the sum of ------."

After the findings of fact were made, the order to cease and desist, here complained of, was entered.

The question, plainly stated, is: Does the leasing, under the terms of the contract in evidence, at a nominal charge, of containers and pumps by petitioner to purchasers of its gasoline constitute an "unfair method of competition," as those words are used in section 5 of the Federal Trade Commission act of Sept. 26, 1914, or may the effect of such leasing be to substantially lessen competition and tend to create for the respondent a monopoly in the business of selling petroleum products in violation of section 3 of the Clayton Act?

This identical matter was recently decided by the Court of Appeals in the Second Circuit in The Texas Company v. Federal Trade Commission, and Standard Oil Company of New York v. Federal Trade Commission, adversely to the respondent's contention here.

(1) "Unfair methods of competition" have been discussed by this court in the opinion in Kinney-Rome Company v. Federal Trade Commission (— Fed. Rep., —) just filed.

Neither section relied upon gives the Federal Trade Commission power to regulate trade generally. The jurisdiction under section 5

exists only where there are practices that amount to a fraud in regard to some public or private right; otherwise, they do not, in our opinion, as we said in the Kinney-Rome Case, supra, amount to an unfair method of competition.

In addition to the reasons upon which the decision was
295 based in the Texas Company Case, supra, we are of opinion that petitioner had the undoubted right to furnish any and every purchaser such containers and conveniences to aid him in delivering the gasoline into the possession of the consumer as it might see fit, and at such cost as it might see fit. The right to fix prices is not given to the Federal Trade Commission. The only cases where the question of price has come into consideration have been those wherein the making of a price—in some cases high, in others low—has been used as an element in some fraudulent scheme of oppression. The price which one may put upon that which he has to sell or lease is a matter wholly his own. United States v. Freight Assn., 166 U. S., 290, 320; Sears, Roebuck & Co. v. Federal Trade Com., 258 Fed., 307, 312.

Competition is not an unmixed good. It is a battle for something that only one can get; one competitor must necessarily lose. The weapons in competition are various—superior energy, more extensive advertising, better articles, better terms as to time of delivery, place of delivery, time of credit, interest or no interest, freights, methods of packing, lower prices, more attractive and more convenient packages, superior service, and many others, are and always have been considered proper weapons. Expense attending the use of any weapon, the foolishness of it, the fact that a method is uneconomical, or that the competitor can not meet any method or scheme of competition because it will be ruinous to him to do so, have not, nor has either of them, ever been held unfair. Such things are a part of the strife inherent in competition. Some merchants sell and deliver goods at the counter and you must take them away; others deliver them at your house, or in any town, State or country—that is merely a part of the bargain. Some people deliver a hat in a bag at the store; others deliver it at your house in a fancy box that is used by many purchasers as a container. Petitioner said, "Here is a container and a pump; you may take and use them for the storage and pumping of gasoline bought from us; if you wish to use them otherwise you may and must buy them." In kind, that is nothing more than loaning a barrel, with a faucet in it. The fact that the tank and pump are much more expensive does not make the transaction different, nor unfair. If that is not true, then the law must mean that the Trade Commission is set as a watch on competitors, with the duty and the power to judge what
299 is too fast a pace for some and to compel others to slow up. In other words, to destroy all competition except that which is easy. We are of opinion that Congress did not intend to bestow any such power, and that it did not intend to do more than to

eliminate the almost infinite variety of fraudulent practices from business in interstate commerce.

(2) We are of opinion that there was no violation of section 3 of the Clayton Act. The complaint under that section is that petitioner made leases for the container and pump and fixed the price therefor, "On the condition, understanding, and agreement that the lessee thereof shall not purchase or deal in the products of a competitor or competitors, of respondent" (petitioner).

There is nothing in the evidence nor in the findings of fact by the Federal Trade Commission that supports any such charge. The finding is that there was a uniform contract. There is no word there about purchasing from competitors. The only limitation is that, "The above described equipment shall be used by party of the second part for the sole purpose of storing and handling the gasoline supplied by party of the first part."

But there are other findings, that, taken in connection with the order to cease and desist, very clearly indicate what the commission deemed the real trouble which it desired to reach was, viz,

"That the monetary considerations received by respondent" (petitioner) "do not represent reasonable returns upon the investment in such devices and equipment; and also that such leases and loans of said devices and equipment are made for monetary considerations below the cost of purchasing and vending the same."

And, again,

"That only a small proportion of such lessees as handle similar products of respondent's competitors require or use more than a single pump outfit in the conduct of their said business; that the practice of leasing such devices requires a large capital investment; that many competitors of respondent do not possess sufficient capital and are not able to purchase and lease devices as respondent does, as aforesaid, partly by reason of which such competitors have lost numerous customers to respondent; that the effect of the practice of leasing by contract such equipments, where such contracts con-
210 tain the said provision restricting the use of the same to the storage and handling of respondent's products as aforesaid, may be to substantially lessen competition, etc."

There are two paragraphs of the order to cease and desist, and they are substantially as follows: The substance of the first is that petitioner shall not lease the equipment in question at a rental which will not yield to it a reasonable profit, and the substance of the second is that petitioner shall not enter into or continue to operate under contracts whereby dealers agree that, in consideration for the leasing to them of such equipment, the same shall be used only for storage or handling the product of petitioner.

The necessary conclusion from the above findings and the order entered is: First, that the commission deemed it lawful and proper for it to condemn certain rentals and also to fix and regulate the rentals on the equipment; because the furnishing of such equipment required a large capital investment and because many competitors

of respondents were financially unable to do that same sort of thing. As we have hereinbefore said, Congress did not bestow upon respondent any power to regulate or fix prices (Sears, Roebuck & Co. v. Federal Trade Commission, 258 Fed., 312); nor do we find anything in the law which indicates that it is illegal for one competitor to do that which is beyond the financial ability of another competitor; nor do we find anything that authorizes respondent to regulate competition for that reason. Section 3 does not make it unlawful to make sales or leases, but does make it unlawful to make sales or leases on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in goods, etc., of a competitor where the effect of such lease, condition, agreement, or understanding may be to substantially lessen competition, etc. The above provisions of section 3 were the substance of the unproven charge in respondent's complaint against petitioner, referred to above. It is perfectly clear that that which the commission found was "the uniform contract used by respondent for leasing such devices" contained no provision comparable with or equivalent to the thing prohibited in section 3. We are of opinion that there is nothing in the section that could be construed as preventing petitioner under the circumstances shown in this case, from putting a limitation upon the use of the thing leased. It has long been a practice in real
211 estate leases to include limitations upon the use of the property, and the reasons for doing so are obvious. Such has likewise been the practice in the leasing or hiring of personal property. The reasons for such limitations are even more obvious than those for the placing of them in real estate leases. Some of the reasons are pointed out in the opinion in the Texas Company Case, supra.

(3) In the case, as in the Fruit Growers Express Case (— Fed. Rep., —), decided by this court, opinion filed June 16, 1921, if an order to cease and desist is to stand, the effect of the action of the Federal Trade Commission seems to have been to terminate and destroy the contractual rights of persons not parties to the proceeding.

The order to cease and desist is annulled and set aside.

A true copy.
Teste:

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

212 And afterwards, on the same day, to wit, on the eighth day of September, 1921, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

THURSDAY, SEPTEMBER 8, 1921.

Court met pursuant to adjournment.

Present: Hon. Samuel Alschuler, circuit judge, presiding; Hon. Evan A. Evans, circuit judge; Hon. George T. Page, circuit judge; Edward M. Holloway, clerk.

Before: Hon. Francis E. Baker, circuit judge; Hon. Evan A. Evans, circuit judge; Hon. George T. Page, circuit judge.

SINCLAIR REFINING COMPANY, a corporation, *vs.* FEDERAL TRADE COMMISSION.	2838. Original petition to review order of Federal Trade Commission.

This cause came on to be heard on the petition of Sinclair Refining Company, a corporation, to review the order to cease and desist entered against said petitioner by the Federal Trade Commission on the fourteenth day of October, 1919, in a cause lately pending before said commission entitled "Federal Trade Commission vs. Sinclair Refining Company," and upon the transcript of the proceedings before the Federal Trade Commission in said cause, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the said order of the said Federal Trade Commission to cease and desist, be, and the same is hereby annulled and set aside.

213 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 19, inclusive, contain a true copy of the proceedings had and papers filed (except the order entered on May 3, 1920, which appears on page 1 of the printed original petition to review order of Federal Trade Commission, etc., certified herewith, and the petition to review order of Federal Trade Commission, which appears on page 2 of the printed petition to review order of Federal Trade Commission, certified herewith, and the briefs of counsel,) in the case of Sinclair Refining Company, a corporation, petitioner, vs. Federal Trade Commission, No. 2838, October Term, 1919, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this thirteenth day of October, A. D. 1921.

[SEAL.] EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Indorsed:) United States Circuit Court of Appeals for the Seventh Circuit.

214 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, Greeting:

Being informed that there is now pending before you a suit in which Sinclair Refining Company is petitioner, and Federal Trade Commission is respondent, No. 2838, which suit was removed into the said Circuit Court of Appeals by virtue of original petition to review order of Federal Trade Commission, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby
215 command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the tenth day of January, in the year of our Lord one thousand nine hundred and twenty-two.

M. R. STANSBURY,
Clerk of the Supreme Court of the United States.

216 In the Supreme Court of the United States, October Term, 1921.

FEDERAL TRADE COMMISSION, PETITIONER,
v.
SINCLAIR REFINING COMPANY, RESPONDENT,
} No. 630.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Seventh Circuit to the writ of certiorari granted therein.

JAMES M. BECK,
Solicitor General.
RAY T. OSBORN,
Counsel for Respondent.

(Endorsed:) Filed Jan. 16, 1922. Edward M. Holloway, clerk.

UNITED STATES OF AMERICA, *Seventh Circuit, ss:*

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full copy of which appears above, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of Sinclair

Refining Company, a corporation, petitioner, vs. Federal Trade Commission, respondent, No. 2838, is a full, true, and complete transcript of the record upon which said cause was heard in the United States Circuit Court of Appeals for the Seventh Circuit, together with all proceedings in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 16th day of January, A. D. 1922.

[SEAL.] EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Indorsed:) File No. 28,585. Supreme Court of the United States. No. 630, October Term, 1921. Federal Trade Commission vs. Sinclair Refining Company. Writ of certiorari. Filed Jan. 16, 1922. Edward M. Holloway, Clerk.

(Stamped:) Received Jan. 21, 1922. Office of the Clerk Supreme Court U. S.

217 (Indorsed:) File No. 28585. Supreme Court U. S., October Term, 1921. Term No. 630. Federal Trade Commission, petitioner, vs. Sinclair Refining Co. Writ of certiorari and return. Filed Jan. 21, 1922.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 638

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

GULF REFINING COMPANY, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

VOLUME I.

PROCEEDINGS AND APPEAL PAPERS.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1922

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. —.

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

GULF REFINING COMPANY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

FEDERAL TRADE COMMISSION,
v.
GULF REFINING COMPANY. } Docket No. 320.

CERTIFICATE.

I, J. P. Yoder, Secretary of the Federal Trade Commission, certify that the following is a full, true and correct transcript of the record in the above entitled proceeding, including the pleadings, testimony, exhibit, the Commission's report, findings as to the facts and conclusions and orders therein; that this transcript is transmitted to the United States Circuit Court of Appeals for the Third Circuit pursuant to service upon the Commission of a copy of a petition for review on the 30th day of September, A. D. 1920.

In testimony whereof, I have hereunto subscribed my name and caused the seal of the Federal Trade Commission to be affixed hereto, at the City of Washington, in the District of Columbia, this 8th day of October, A. D. 1920.

[SEAL.]

J. P. YODER,
Secretary.

UNITED STATES OF AMERICA.

BEFORE

FEDERAL TRADE COMMISSION.

DOCKET NO. 320.

FEDERAL TRADE COMMISSION

VS.

GULF REFINING COMPANY, RESPONDENT.

Transcript of the proceedings before the Federal Trade Commission—certified to the United States Circuit Court of Appeals for the Third Circuit, in accordance with the provisions of Section 5 of the Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and of

Section 11 of the Act of Congress approved October 15, 191 entitled "An Act to supplement existing laws against unlawf restraints and monopolies, and for other purposes"—as a resu of the petition filed in said Court on September 11, 1920, by th Attorneys for the Gulf Refining Company, for a review of th Order to Cease and Desist entered by the Federal Trade Co mission against said Gulf Refining Company under date April 27, 1920.

Resolution authorizing complaint—Dated July 18, 1919.

At a regular session of the Federal Trade Commission, held at i office in the City of Washington, D. C., on the 18th day of Jul A. D. 1919.

Present: John Franklin Fort, Chairman, Victor Murdock, Hust Thompson, William B. Colver, Commissioners.

FEDERAL TRADE COMMISSION *v.* GULF REFINING COMPANY.	Docket No. 320. Complaint in the matter of the alleg violation of Section 5 of an Act Congress approved September 2 1914, and of the alleged violation Section 3 of the Act of Congress a proved October 15, 1914.

WHEREAS, the Federal Trade Commission has reason to believe tha the Gulf Refining Company has violated and is violating the pro sions of Section 5 of the Federal Trade Commission Act, and of Se tion 3 of an Act of Congress approved October 15, 1919; therefo be it

RESOLVED: That the Federal Trade Commission issue and ser upon the said Gulf Refining Company, its complaint, stating i charges in that respect in substantially the form hereunto annexed and be it

FURTHER RESOLVED: That notice be given to the said Gulf Refinin Company, as required by law, that the charges of said complain will be heard by the Commission at its office in the City of Washing ton, D. C., on the 15th day of September, 1919, at 10.30 o'clock i the forenoon of the said day, or as soon thereafter as the same ma be reached.

Adopted by the Commission.

(Signed) J. P. YODER,
Secretary.

[SEAL.]

Complaint—Dated July 18, 1919.

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss.:

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 18th day of July, A. D. 1919.

Present: John Franklin Fort, Chairman; Victor Murdock, Huston Thompson, William B. Colver, Commissioners.

FEDERAL TRADE COMMISSION *v.* GULF REFINING COMPANY.	Docket No. 320. Complaint in the matter of the alleged violation of Section 5 of the Act of Congress approved September 26, 1914, and Section 3 of the Act of Congress, approved October 15, 1914.

I.

The Federal Trade Commission, having reason to believe from a preliminary investigation made by it, that the Gulf Refining Company, hereinafter referred to as the respondent, has been using unfair methods of competition in interstate commerce, in violation of the provisions of Section 5 of the Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint, stating its charges in that respect on information and belief as follows:

PARAGRAPH ONE: That the respondent, Gulf Refining Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at the City of Pittsburgh, State of Pennsylvania; that for more than four years last past respondent has been engaged in the business of purchasing and selling refined oil and gasoline, and the leasing and loaning of oil pumps, storage tanks or containers and their equipments, in various states of the United States and the District of Columbia in competition with numerous persons, firms, corporations and copartnerships similarly engaged.

PARAGRAPH TWO: That the respondent, in the conduct of its business, as aforesaid, and as hereinafter more particularly described, purchases refined oil and gasoline, hereinafter referred to as "products," and also purchases oil pumps, storage tanks or containers, hereinafter referred to as "devices," the said devices being used to contain said products, the said products and devices then being handled and stored in the various states of the United States and transported in interstate commerce; that the aforesaid products are sold and the aforesaid devices are leased or loaned by respondent to various persons, firms, corporations and copartnerships; that in the con-

duct of its business of purchasing and selling such products and sell-
ing, leasing or loaning such devices, the same are constantly moved
from one state to another by respondent and there is conducted by
respondent a constant current of trade in such products and devices
between various states of the United States; that there are numer-
ous competitors of respondent who, in the conduct of their busines
in competition with respondent, purchase similar products and pur-
chase and manufacture similar devices, the said devices being used
to contain said products, the said products and devices then being
handled and stored in the various states of the United States and
transported in interstate commerce; that the aforesaid products are
sold and the aforesaid devices sold, leased or loaned by such com-
petitors of respondent to various persons, firms, corporations and co-
partnerships; that in the conduct of their business, as aforesaid, com-
petitors of respondent constantly move such products and devices
from one state to another and there is conducted by said competitors
a constant current of trade in such products and devices between the
various states of the United States; that respondent and many of its
competitors have conducted their said businesses in a similar manner
to that above described throughout the past four years.

PARAGRAPH THREE: That respondent in the conduct of its business
as aforesaid, with the effect of stifling and suppressing competition
in the sale of the aforesaid products and in the sale, leasing or
loaning of the aforesaid devices and other equipments for storing
and handling the same, and with the effect of injuring competitors
who sell such products and devices, has within the four years last
past sold, leased or loaned and now sells, leases or loans the said
devices and their equipments for prices or considerations which do
not represent reasonable returns on the investments in such devices
and their equipments; that many such sales, leases or loans of the
aforesaid devices are made at prices below the cost of producing and
vending the same; that many of such contracts for the lease or loan
of such devices and their equipments provide or are entered into
with the understanding that the lessee or borrower shall not place
in such devices, or use in connection with such devices and their
equipments, any refined oil or gasoline of a competitor; that only
a small proportion of the dealers in gasoline and refined oil under
such agreements and understandings deal also in similar products of
respondent's competitors and that only a small proportion of such
dealers require or use more than a single pump outfit in the conduct
of their said business; that there are numerous competitors in the
sale of such products, who are unable to enter into such lease agree-
ments or understandings because of the large amount of investment
required to carry out such lease agreements as a competitive method
of selling refined oil and gasoline; that there are numerous other
competitors of respondent engaged in the manufacture and sale
of said devices and their equipments, who do not deal in refined
oil and gasoline, and therefore do not sell or lease said devices and
their equipments for a nominal consideration on a condition

understanding that their products only are to be used therein; that the said numerous competitors who were unable to enter into such lease agreements or understandings, as aforesaid, have lost numerous customers in the sale of refined oil and gasoline to respondent because of the business practices of respondent hereinbefore set forth. That the said numerous other competitors of respondent who manufacture and sell said devices and their equipments, but do not sell refined oil and gasoline, as aforesaid, have lost numerous customers and prospective customers for the purchase of their devices and equipments because of the said business practices of respondent, as hereinbefore set forth.

II.

The Federal Trade Commission, having reason to believe from a preliminary investigation made by it, that the Gulf Refining Company, hereinafter referred to as the respondent, has been using unfair methods of competition in interstate commerce, in violation of the provisions of Section 3 of the Act of Congress, approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint, stating its charges in that respect on information and belief as follows:

PARAGRAPH ONE: That the respondent, Gulf Refining Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business in the city of Pittsburgh, State of Pennsylvania; that for more than four years last past respondent has been engaged in the business of purchasing and selling refined oil and gasoline and the leasing of oil pumps and storage tanks and their equipments in various states of the United States and the District of Columbia, in competition with numerous persons, firms, corporations and copartnerships similarly engaged.

PARAGRAPH TWO: That the respondent in the conduct of its business, as aforesaid, and as hereinafter more particularly described, purchases refined oil and gasoline, hereinafter referred to as "products," and also purchases oil pumps, storage tanks or containers, hereinafter referred to as "devices," the said devices being used to contain said products, the said products and devices then being handled and stored in the various states of the United States and transported in interstate commerce. That such products are sold, and such devices sold, leased or loaned by respondent to various persons, firms, corporations and copartnerships; that in the conduct of its business of purchasing and selling such products and selling, leasing or loaning such devices, the same are constantly moved from one state to another by respondent, and there is conducted by respondent a constant current of trade in such products and devices between the various states of the United States; that there are numerous competitors of respondent who in the conduct of their

businesses in competition with respondent purchase similar products and purchase and manufacture similar devices, the said devices being used to contain said products, the said products and devices then being handled and stored in the various States of the United States and transported in interstate commerce; that such products are sold and the aforesaid devices sold, leased or loaned by such competitors in competition with respondent to various persons, firms, corporations and copartnerships; that in the conduct of such business, as aforesaid, respondent's competitors constantly move such products and devices from one state to another and there is conducted by said competitors of respondent a constant current of trade in such products and devices between the various states of the United States; that respondent and many of its competitors have conducted their said businesses in a similar manner to that above described throughout the four years last past.

PARAGRAPH THREE: That the respondent, for four years last past, in the conduct of its business as aforesaid, has leased and made contracts for the lease and is now leasing and making contracts for the lease of said devices and their equipments to be used within the United States, and has fixed and is now fixing the price charged therefor on the condition, agreement or understanding that the lessees thereof shall not purchase or deal in the products of a competitor or competitors of respondent; and that the effect of such leases or contracts for lease, and conditions, agreements, or understandings, may be and is to substantially lessen competition and tend to create a monopoly in the territories and localities where such contracts are operative.

Therefore, notice is hereby given you, the said Gulf Refining Company, that the charges of this complaint will be heard by the Federal Trade Commission at its offices in the City of Washington, D. C., on the 15th day of September, A. D. 1919, at 10.30 o'clock in the forenoon of that day, or as soon thereafter as the same may be reached, at which time and place you shall have the right to appear and show cause why an order should not be entered by the Federal Trade Commission requiring you to cease and desist from the violations of law charged in this complaint.

And you will further take notice that within thirty (30) days after the service of this complaint, you are required to file with the Commission an answer in conformity with Rule III of the Rules of Practice before the Commission.

In witness whereof, the Federal Trade Commission has caused this complaint to be issued, signed by its Secretary, and its official seal to be affixed hereto at the City of Washington, D. C., this 19th day of July, A. D. 1919.

By the Commission.

[SEAL.] (Signed) J. P. YODER.
Secretary.

(Signed) CLAUDE R. PORTER,
Chief Counsel for the Commission.

Respondent's answer—Filed September 4, 1919.

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

FEDERAL TRADE COMMISSION *v.* GULF REFINING COMPANY.	Docket No. 320. Complaint in the matter of the alleged violation of Section 5 of the Act of Congress approved September 26, 1914, and Section 3 of the Act of Congress approved October 15, 1914.

The respondent, the Gulf Refining Company, answers the complaint in the above-entitled matter as follows:

I.

As to the first division of said complaint, paragraph one, the respondent admits that it is a corporation organized, existing and doing business under the laws of the State of Texas, with its principal office in the City of Pittsburgh, State of Pennsylvania, and that during the period mentioned in said complaint said Company has been engaged in the business, not only of purchasing and selling refined oil and gasoline but of manufacturing all forms of petroleum products at its refineries at Port Arthur and Forth Worth, Texas, and that incident to the sale of gasoline at retail, said respondent has, for several years past, leased to customers oil pumps and storage tanks in various states of the United States, and that said respondent has been engaged in active and continuous competition with numerous firms, corporations and copartnerships similarly engaged.

II.

As to paragraph two of the said complaint respondent admits that it has purchased, from time to time, from various manufacturers, pumps and tanks, as therein stated, and that said devices have been leased by it to various customers throughout the United States, but respondent denies that it is engaged in the business of purchasing and selling such devices in interstate traffic, or that there is conducted by respondent a constant current of trade in such devices in various states of the United States, or that in the purchase and leasing of such equipment and devices, respondent is competing with various persons, firms, corporations and copartnerships engaged in the manufacture and sale of such devices; on the contrary the respondent avers that it is engaged in the sale of petroleum and petroleum products manufactured and purchased by it throughout the United States in open, fair and unrestricted competition with other persons, firms, corporations and copartnerships engaged in similar business; and that the purchase and leasing of pumps and tanks, referred to in the complaint as "devices," is merely incidental to its business as a mar-

keter of petroleum and petroleum products, especially gasoline, and that the leasing of said devices by this respondent is a proper and lawful practice; that same is not an unfair method of competition and has no tendency to create or maintain a monopoly.

III.

As to paragraph third of the first division this respondent denies that in the conduct of its business, as aforesaid, it has any intention to stifle and suppress competition, to injure competitors, or to create a monopoly in the sale of its gasoline; it is particularly denied that the method of operating its business, employed by this respondent, has the effect of either stifling or suppressing competition, or injuriously affecting competitors engaged in the business of marketing and selling petroleum products. It is true that for four years last past this respondent has leased at nominal rentals, to customers desiring to market its products, tanks and pumps, designated in the complaint as "devices," and that the amount of such rentals is not based upon a reasonable return to the respondent upon the investment in such devices and equipment.

IV.

It is also true that these leases are conditioned upon the exclusive use of the devices and equipment leased for the handling of gasoline manufactured and sold by respondent, but said contracts do not contain any restriction, or is there any understanding between the respondent, and the customers to whom such devices are leased, that they shall not purchase gasoline and other petroleum products from competitors; the restriction is limited only to the use of the particular device furnished by the respondent, and is restricted to the storage and sale of gasoline manufactured and furnished by the respondent under its established and protected trade names.

V.

It is also denied that there is anything in the contract of lease, or in any verbal understanding incident thereto, that prevents or prohibits the customer from installing equipment or devices of competing oil companies, and from handling and selling products of such competitors in or from devices either owned by the customer or furnished by competing oil companies. In many cases customers to whom devices and equipment have been leased at nominal rentals by respondent, have installed, under practically similar arrangements, equipments and devices of competitors of respondent, and the respondent company has frequently installed its devices and equipment, for the exclusive use and sale of its products and protected brands of gasoline, with customers who have already installed and have in use, similar equipment for the exclusive sale and handling of gasoline manufactured and sold by other oil companies in

ompetition with the products of respondent. A printed copy of the orm of agreement and contract, under which said devices are leased retailers by respondent company, is hereto attached, marked Exhibit A," and is made a part of this answer.

VI.

As to division two, paragraph one, the facts as stated are not enied, except that in addition to the purchasing and selling of efined oil and gasoline, the respondent avers that it is engaged in he business of manufacturing gasoline and all forms of petroleum roducts, and that the business of purchasing and leasing oil pumps nd storage tanks is merely incidental to the selling of gasoline at etail.

VII.

As to paragraph two, division two, of said complaint it is denied hat the respondent is engaged in the purchase and lease of said umps and tanks, designated as "devices" in said complaint, and the same are constantly moved from one state to another by respondent, and that there is conducted by respondent a constant current of trade in such devices between various states of the United States. It is true that in the manufacture and sale of petroleum and petroleum products, respondent is engaged in interstate commerce, and is constantly transferring said products from state to state, and maintains a constant current of trade in such products between the various states of the United States and in competition with others.

VIII.

As to paragraph three, division two, of complaint, it is denied that the respondent, in the leasing of said tanks and pumps, referred to in the complaint as "devices" has fixed, or is fixing the price charged therefor on a condition, agreement or understanding that the lessee thereof shall not purchase or deal in the products of competitors of the respondent. There is no such agreement or understanding, but there is a provision in the contract that the particular equipment, or device, so leased at a nominal rental by respondent, shall not be used for the storage or sale of other petroleum products than those manufactured and sold by respondent. It is denied that the effect of such leases or contracts for lease, and conditions and agreements, is to substantially lessen competition, or that the same has any tendency to create a monopoly in the territories or localities where such contracts are operative.

IX.

And generally the respondent makes answer that the agreement of lease, used by the respondent and in use at the present time (copy of which is hereto attached, marked "Exhibit A"), is a legal, proper

agreement and is necessary to protect the respondent and the general public in the purchase of the special grades of gasoline manufactured by respondent, and sold under protected and well-established trade names; said agreement or lease is not used by the respondent for any illegal, improper or unfair purpose whatsoever, and the respondent, further avers that the effect of said agreement is not and cannot be to lessen competition by any unfair method or to restrict or stifle competition within the territory where said contracts are in force, or that said practice has a tendency to, or in fact does create a monopoly in the sale of gasoline and similar products manufactured and sold by the respondent.

The respondent denies generally each and all the allegations of the complaint not hereinbefore expressly admitted.

GULF REFINING COMPANY.
By GEO. S. DAVISON.

EXHIBIT A.

Memorandum of Agreement.

Agreement, made this ____ day of _____, 19____, between the Gulf Refining Company, party of the first part, and _____ of the City of _____ State of _____, party of the second part:

WHEREAS, The part of the second part is now purchasing gasoline from the party of the first part for sale to the consumers thereof, and has requested the party of the first part to install an equipment on his premises situate _____ for the better storage and handling of the gasoline so purchased; and

WHEREAS, The party of the first part is willing to comply with said request, and is about to install upon the premises of the second party a gasoline storage tank with necessary piping, fittings and pump.

Now this agreement witnesseth:

FIRST. That the party of the second part is the owner of the premises above mentioned, or if not the owner that he has a valid and subsisting lease for the same. If the party of the second part is a tenant and not the owner of the premises, said party agrees to procure the written consent of the owner to the installation of the equipment hereinafter mentioned, with an agreement that the property of the party of the first part stored or installed upon the premises shall be exempt from levy, sale or distress for rent and that upon the determination of this contract the said party of the first part shall have the right to enter upon said premises for the purpose of removing any and all of its properties therefrom.

SECOND. That said equipment shall be used solely for the storage and handling of gasoline supplied by the party of the first part under the terms of this agreement.

THIRD. That the said party of the second part will at his own cost and expense maintain such equipment in good condition and repair as long as he shall continue to use the same.

FOURTH. That the said party of the second part will not encumber or remove said equipment or do or suffer to be done anything whereby said equipment or any part thereof shall be seized, taken in execution, attached, destroyed or damaged, or by which the title of the party of the first part to the same, may in any way be disturbed or prejudiced.

FIFTH. That the party of the second part shall indemnify and save harmless the party of the first part of and from any and all liability for loss, damage, injury or other casualty, to persons or property, caused or occasioned by any leakage, fire or explosion of gasoline stored in said tank, or drawn through said pump, whether due to imperfection in said equipment or any part thereof, latent or patent, or to any fault in the installation thereof, and whether the same arises from negligence or otherwise.

SIXTH. That in case the party of the second part shall at any time use the said equipment for any other purpose than the storage and handling of gasoline purchased from the party of the first part, or should said second party cease for thirty (30) days to purchase gasoline from the party of the first part and sell the same in his regular trade, the right to the use of said equipment shall terminate and the party of the first part shall thereupon have the right to enter upon the said premises and remove said equipment and every part thereof.

SEVENTH. This agreement shall terminate forthwith upon the sale or other disposition of the premises by the party of the second part and in any event at the end of one year from the date thereof. Upon the expiration of this agreement the party of the first part shall have the right to enter upon said premises and remove said equipment and every part thereof.

EIGHTH. For the use of said equipment the party of the second part agrees to pay to the party of the first part an annual rental of one dollar, payable annually in advance.

Executed in triplicate the day and year as above written.

GULF REFINING COMPANY.

By _____

_____

Witness:

_____

Witness:

_____

In consideration of One Dollar to me in hand paid, and other good and sufficient consideration, I_____ _____, owner of the premises mentioned in the within agreement, having read and being familiar with the same, do hereby consent to the installation by the Gulf Refining Company of the storage

equipment above mentioned, together with pumps, fittings, etc., and do further agree that the property of said Gulf Refining Company, including storage tanks, pumps and fittings, shall be exempt from levy, sale or distress for rent due or to become due for the premises above mentioned during the continuance of the present lease or any renewal thereof; also that said Gulf Refining Company may remove said property, at any time, as provided for in said agreement.

Witness my hand and seal this_____day of_____, 19__

_____[SEAL.]

Witness:

_____

Commission's report, findings of facts and conclusions—Dated April 27, 1920.

UNITED STATES OF AMERICA,

Before Federal Trade Commission, ss:

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 27th day of April, A. D. 1920.

Present: Victor Murdock, Chairman, Huston Thompson, William B. Colver, Nelson B. Gaskill, Jno. Garland Pollard, Commissioners.

FEDERAL TRADE COMMISSION
v.
GULF REFINING COMPANY. } Docket No. 320.

The Federal Trade Commission having issued and served its complaint herein wherein it is alleged that it had reason to believe that the above-named respondent, Gulf Refining Company, has been and now is using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and has been and now is violating the provisions of Section 3 of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," and that a proceeding by it in respect of such alleged violation of Section 5 of the Act of September 26, 1914, would be to the interest of the public, and fully stating its charges in that respect, and the respondent having entered its appearance by W. J. Guthrie, Esq., its attorney, and having duly filed its answer, admitting certain of the allegations of said complaint and denying certain others thereof, and containing certain allegations as affirmative defense, and the Commission having offered testimony in support of the charges of said complaint, and the respondent having rested its case without introducing evidence, and the cause having been duly argued before the Commission, and

the Commission having duly considered the record and being fully advised in the premises, now makes its Report and Findings as to the Facts, and Conclusions:

Findings of Facts.

PARAGRAPH ONE: That the respondent is a corporation organized, existing and doing business under and by virtue of the laws of the state of Texas, with its principal office located in the City of Pittsburgh, in the State Pennsylvania, and is now and has been engaged in the business of purchasing and selling refined oil and gasoline, and is largely engaged in refining crude petroleum, and that it is now and has been during the four years last past, in connection with its aforesaid business, engaged in the leasing and loaning, but not in the manufacture, of oil pumps, storage tanks and containers, and equipment hereinafter referred to as devices, in various states of the United States, in competition with numerous other persons, firms, copartnerships and corporations also engaged in the business of selling refined oil and gasoline, and refining crude petroleum.

PARAGRAPH TWO: That the respondent, in the conduct of its business as aforesaid, and as hereinafter more particularly described, extensively refines petroleum and its products and purchases refined oil and gasoline and also purchases oil pumps, storage tanks and containers hereinafter referred to as devices. That respondent has been and now is maintaining numerous storage stations in various states to which it ships from its refineries, refined oil and gasoline in bulk. And that the said refined oil and gasoline is thereafter sold and delivered to retail dealers in the said several states. That the respondent, in the course of its said business, leases and delivers said devices to various persons, firms, copartnerships and corporations, in various states other than those in which the said devices are purchased by the respondent; and that in the course of commerce in buying and selling said devices, said devices are moved to, through and among the various states of the United States, and that there is a constant current of trade in the conduct of its said business in buying and selling said equipment among said various states of the United States.

PARAGRAPH THREE: That during all of said period, respondent, in the course of commerce among the several states and territories of the United States and in the conduct of its business as aforesaid, has been and now is leasing to retailers of its petroleum products, said devices for use by such retailers in storing and handling respondent's said petroleum products. That respondent, in leasing such devices as aforesaid during said period, has made and does now make, contracts or leases with the said retailers in and by the terms of which the said retailer agrees to use the said device for containing, storing and vending the products of the respondent, exclusively. That the rental or lease charge provided for in such contracts is a nominal sum and that no other consideration for the leasing of such equipments by

respondent, is provided for by said contracts, and that such devices are leased at nominal rentals as aforesaid to promote and advance respondent's petroleum and gasoline business. That such nominal sums or rentals do not afford a reasonable profit to respondent on the amount invested in such devices. That the respondent leases such equipments in competition in interstate commerce with manufacturers of similar equipments who are engaged in the sale of the same in such commerce.

PARAGRAPH FOUR: That the respondent sells its said products in various states and territories of the United States in competition with other refiners and wholesale dealers in petroleum products and gasoline, and respondent has practiced the leasing of said devices to retailers in the various states and territories as aforesaid, as a method of competing with other firms, persons, partnerships and corporations also engaged in refining and selling in wholesale quantities, gasoline, refined oil and petroleum products.

PARAGRAPH FIVE: That the contracts mentioned herein generally expressly provide that said devices shall be used by the lessee only for the purpose of holding and storing the respondent's said petroleum products, and all of said contracts or leases which the respondent has entered into as aforesaid, have been made on the condition, agreement or understanding, that the lessee or purchaser thereof should use the said device only for the purpose of holding and storing petroleum products purchased from the respondent. That a small number of retail dealers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid, handle similar products of respondent's competitors, but a large majority of the retailers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid, require and use in their business, only a single pump outfit.

PARAGRAPH SIX: That the respondent has practiced the leasing or selling of such devices upon the terms and conditions aforesaid, for the purpose of obtaining and holding customers, and of preventing its competitors from obtaining as customers, the retail dealers with whom it has entered into such contracts or leases as aforesaid.

PARAGRAPH SEVEN: That many competitors of the respondent do not sell or lease such devices to retail dealers upon the terms and conditions referred to herein, and such competitors have lost numerous customers to the respondent as a result of the respondent's practice of offering and leasing said devices to such retail dealers upon the terms and conditions aforesaid.

Conclusions:

That the practice of leasing such devices at a nominal rental and of selling such devices for a nominal consideration, is an unfair method of competition in interstate commerce as against the competitors of respondent engaged in the manufacture of such devices,

and in the sale of the same for profit, in the territory wherein the respondent leases such devices and also as against competitors of respondent engaged in the business of refining crude petroleum and selling at wholesale refined oils, gasoline and petroleum products, who do not invest in or make use of such devices for the purpose and on the terms and conditions aforesaid.

That the methods of competition and the business practices set forth in the foregoing Findings as to the Facts are under the circumstances, set forth herein, unfair methods of competition in interstate commerce within the meaning of Section 5 of an Act of Congress approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties and for other purposes," and constitute a violation of Section 3 of an Act of Congress approved October 15, 1914, entitled, "An Act to supplement existing laws against unlawful restraint and monopolies, and for other purposes."

(Signed) VICTOR MURDOCK, *Chairman*,
HUSTON THOMPSON,
WILLIAM B. COLVER,
NELSON B. GASKILL,
Commissioners.

Dated this 27th day of April, 1920.

Commission's order to cease and desist—dated April 27, 1920.

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss.:

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 27th day of April, A. D. 1920.

Present: Victor Murdock, chairman; Huston Thompson, William B. Colver, Nelson B. Gaskill, Jno. Garland Pollard, Commissioners.

FEDERAL TRADE COMMISSION
v.
GULF REFINING COMPANY. } Docket No. 320.

The Federal Trade Commission having issued and served its complaint herein wherein it is alleged that it had reason to believe that the above-named respondent, Gulf Refining Company, has been and now is using unfair methods of competition, in interstate commerce in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and has been and now is violating the provisions of Section 3 of an Act of Congress approved October 15, 1914, entitled, "An Act to supplement existing laws against unlawful restraints

and monopolies, and for other purposes," and that a proceeding by it in respect of such alleged violation of Section 5 of the Act of September 26, 1914, would be to the interest of the public, and fully stating its charges in that respect, and the respondent having entered its appearance by W. J. Guthrie, its attorney, and having duly filed its answer, admitting certain of the allegations of said complaint and denying certain others thereof, and containing certain allegations as affirmative defense, and the Commission having offered testimony in support of the charges of said complaint, and the respondent having rested its case without introducing evidence, and the cause having been duly argued before the Commission, and the Commission having duly considered the record and being fully advised in the premises, and having made and filed its Report, Findings and Conclusions, which said Report, Findings and Conclusions are hereby referred to and made a part hereof.

Now, therefore, it is ordered, that the respondent, Gulf Refining Company, forever cease and desist from:

(1) Directly or indirectly leasing pumps or tanks or both and equipment for storing or handling petroleum products in furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of same after making due allowance for depreciation and other items usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom, and from doing any matter or thing which would have the same unlawful effects as that resulting from the practice herein prohibited, and by reason of which this order is made.

(2) Entering into contracts or agreements with dealers in its petroleum products or from continuing to operate under any contract or agreement already entered into whereby such dealers agree or have an understanding that as a consideration for the leasing to them of such pumps and tanks and their equipment, the same shall be used only for storing or handling the products of respondent; and from doing anything having the same unlawful effect as that resulting from the practice herein prohibited, and by reason of which this order is made.

Provided, however, that as to such pumps and tanks and equipments as are now leased by respondent, contrary to the provisions of this order, respondent shall be required, four months from the date of service hereof, to enter into new contracts or agreements with respect to same which shall not be incompatible with the purport and intent of this order.

It is also ordered under and by virtue of the authority conferred on the Commission by Paragraph B of Section 6 of an Act to create a Federal Trade Commission, to define its powers and duties and for other purposes, approved September 26, 1914, that the said Gulf Refining Company, respondent, shall within thirty days after the expiration of the time allowed for the respondent to comply with this order to cease and desist, report in writing to the Federal Trade Commission, fully stating and setting forth the nature of the changes

made in the conduct of its business with respect to such matter involved in the order to cease and desist, and shall set forth in such report in complete detail the plan or plans adopted for the lease, loan, gift or sale of any oil tanks and pumps for use in storing refined oil or gasoline. What plan or plans are in use or are proposed to be put in use, and also attached to such report, any contracts used by the respondent in the conduct of such business.

Dated at Washington, this 27th day of April, A. D. 1920.

By the Commission.

J. P. YODER,
Secretary.

[SEAL.]

Petition for review, etc.

FEDERAL TRADE COMMISSION
v.
GULF REFINING COMPANY.

To the Honorable the U. S. Circuit Court of Appeals for the Third Circuit:

I.

The petitioner is the Gulf Refining Company, a corporation under the laws of the State of Texas, with its principal office and place of business at Pittsburgh in the State of Pennsylvania. It makes this application under the terms of Section II of the Act of Congress of October 15, 1914, 38 Statutes 734, and Section 5 of the Act of September 26, 1914, 38 Statutes 719.

II.

Petitioner alleges:

(1) That on the eighteenth day of July, 1919, the Federal Trade Commission filed a complaint under the style hereinbefore given (Docket 320) against petitioner, charging that it had been using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of the Act of Congress of September 26, 1919, and that it had violated Section 3 of the Act of Congress approved October 15, 1914, known as the "Clayton Act."

(2) Due notice of said complaint was given to petitioner.

(3) On the fourth day of September, 1919, petitioner filed an answer thereto.

(4) A hearing upon said complaint was duly had and evidence introduced.

(5) On the 27th day of April, 1920, the Federal Trade Commission filed findings of fact and conclusions on said complaint and entered an order declaring the methods of competition and the business practices in said complaint set forth were unfair and in violation of law, and ordering that they cease.

(6) On the 29th day of May, 1920, notice of said order was given to petitioner.

A copy of the complaint, of the answer, of the findings of fact, and of the decree are filed herewith and made parts hereof.

Petitioner prays that the Commission be required to file herein a transcript of the evidence taken upon said hearing.

II-A.

Petitioner says that so much of the Act of Congress establishing the Federal Trade Commission as undertakes to authorize said Trade Commission and the courts to determine what is unfair competition and to prevent and punish same is unconstitutional and void for the following reasons:

(1) Said Act does not undertake to define unfair competition, but leaves the determination of what shall constitute this offense primarily to the Commission and ultimately to a court whereby

(a) A person engaged in business has no measure or standard by which his actions may be guided, but is subject to have his business disrupted and his property taken or destroyed for reasons or causes which he could not have foreseen or prevented;

(b) Instead of the law defining what may or may not be done, a person is subject to have his business destroyed and his property taken because he is unable to anticipate the views which the Federal Trade Commission and the courts might adopt with reference to the ethics or the effects of some course of business;

(c) A person in business has imposed upon him the burden of defending an action instituted by the Trade Commission, or of instituting one himself because the Trade Commission may have views different from his as to the ethics and advisability of a trade method.

(2) Said Act undertakes to delegate a legislative power, which rests (if anywhere) in Congress, to the Federal Trade Commission and the courts:

(a) The Act does not define unfair competition but leaves a legislative determination of what constitutes this offence to the Trade Commission and the courts;

(b) It leaves to the courts the method and character of punishment instead of defining the consequences of engaging in unfair competition.

(3) Said Act violates the Fourteenth Amendment to the Constitution of the United States, and the other provisions thereof, which undertake to prevent arbitrary governmental invasion of private rights:

(a) It undertakes to give general visitorial powers over the business of every individual engaged in interstate commerce (except transportation) to an extra-constitutional body invested with arbitrary and unrestricted powers;

(b) It requires of individuals engaged in business that they incur the expense of going into court to maintain the right to use their property as property has always been used, because this body conceives it should be otherwise used;

(c) It authorizes this body to interfere with the ordinary and natural right of contract, and requires that to protect this right the individual should defend, or institute, a procedure in court.

(d) It makes it necessary for the individual to incur the labor and expense of litigation when he has violated no criminal law, breached no contract, committed no tort, ignored no obligation but has merely failed to agree with the Commission as to some question of ethics, of business judgment, or of public interest.

(4) Said Act provides for judicial trial of issues (not involving any right or procedure in equity) whereby personal and valuable property rights may be determined, without providing for, or making possible, trial by jury.

III.

Petitioner says that the facts set forth in said complaint do not constitute unfair competition, are not contrary to the public interest, and do not monopolize or tend to restrain trade.

IV.

Petitioner says that it is not engaged in the business of buying and selling or leasing pumps and tanks in interstate business, and that the Federal Trade Commission is without jurisdiction over the subject-matter of the complaint.

V.

Petitioner says that it is not engaged in the business of buying and selling or leasing pumps and tanks, but that its only purchases of such equipment are for direct use by itself in the sale of products which it manufactures, or for the purpose of being furnished under lease or sale to persons with whom it makes an agreement for the sale of its products to be used in making such sales; that all of such sales of its products are in intra-state business and not in interstate business, and petitioner says that the Federal Trade Commission is without jurisdiction over the subject-matter of the complaint and that its order is void.

VI.

Petitioner says that it, together with its affiliated companies, is engaged:

(1) In the production of crude oil; this is not in any instance in interstate commerce;

(2) In the refining of crude oil; this is not in any case in interstate commerce;

(3) In the transportation of crude oil; this is in every case by common carrier when in interstate commerce;

(4) In the sale of petroleum products in interstate commerce; no part of the complaint is predicated upon such business;

(5) In the sale of petroleum products in intrastate commerce. The buying and leasing of pumps and tanks is solely in connection with the sale in intrastate commerce of its petroleum products, being incidental to the retailing—wholly within a state—of such products, either within the state of its manufacture, or within some other state after its interstate shipment by a common carrier and after the completion of the interstate transaction.

VII.

Petitioner complains of the findings and conclusions of fact and of the order, and assigns reasons as follows:

(1) The Federal Trade Commission is without jurisdiction because the methods and practices complained of were not used in interstate business.

(2) The practices complained of did not constitute unfair practices or methods in that they have never before been regarded as "opposed to good morals, as being characterized by deception, bad faith, fraud or oppression."

(3) They are not against the public policy as involving a "dangerous tendency to unduly hinder competition or create a monopoly."

(4) They are not in violation of any rule of law.

(5) The practices complained of did not create, or tend to create, a monopoly nor in any way restrain, or tend to restrain, trade.

VIII.

Paragraph I.

1. Specifically considering the report and findings and conclusions of fact by the Federal Trade Commission, petitioner complains of Paragraph 1 of the Findings of Facts, which is as follows:

"That the respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office located in the City of Pittsburgh, in the State of Pennsylvania, and is now and has been engaged in the business of purchasing and selling refined oil and gasoline, and is largely engaged in refining crude petroleum, and that it is now and has been during the four years last past, in connection with aforesaid business, engaged in the leasing and loaning, but not in the manufacture, of oil pumps, storage tanks and containers, and equipment hereinafter referred to as devices, in various states of the United States in competition with numerous other persons, firms, co-partnerships and corporations also engaged in the business of selling refined oil and gasoline, and refining crude petroleum."

And for cause of complaint avers:

(1) That it is not engaged in the leasing and loaning of oil pumps in various states of the United States in competition with numerous other persons, but is solely engaged in the business of refining petro-

leum and selling petroleum products; that its refining is entirely in the State of Texas; that it is in several states engaged in selling petroleum and its products; that any leasing and loaning of pumps is entirely and exclusively incidental to its business of selling gasoline, and no leasing or loaning is ever made to any person except for the purpose of effecting satisfactory arrangements, for the sale, within a state, of its products, and for providing safe and efficient appliances by which its products may be handled in the sale and delivery thereof to the public.

PARAGRAPH II.

2. Petitioner complains of the findings in Paragraph 2 to the following effect:

"In buying and selling said devices; that is to say, pumps, said devices are moved to and through and among the various states of the United States and that there is a constant current of trade in the conduct of its said business in buying and selling said equipment among the various states of the United States."

And petitioner avers that such of said pumps as are leased or loaned by petitioner are purchased for the specific purpose of installation within some particular state, to be used in the sale of its products to the public; that they are there used directly by petitioner or are leased to the individual who has been selected to make sale of petitioner's products at that place. These "devices" are installed for use at that place and are not thereafter moved or sold in interstate, or intrastate, commerce or otherwise, but are incidentally and continuously used thereafter in making delivery of petitioner's products to the public.

PARAGRAPH III.

3. Petitioner complains of the findings of fact in Paragraph 3, which are as follows:

"That during all of said period, respondent, in the course of commerce among the several States and territories of the United States and in the conduct of its business as aforesaid, has been and now is leasing to retailers of its petroleum products, said devices for use by such retailers in storing and handling respondent's said petroleum products. That respondent, in leasing such devices as aforesaid, during said period, has made and does now make, contracts or leases with the said retailers in and by the terms of which the said retailer agrees to use the said devices for containing, storing and vending the products of the respondent exclusively. That the rental or lease charge provided for in such contracts is a nominal sum and that no other consideration for the leasing of such equipments by respondent, is provided for by said contracts, and that such devices are leased at nominal rentals as aforesaid, to promote and advance respondent's petroleum and gasoline business. That such nominal sums or rentals do not afford a reasonable profit to

respondent on the amount invested in such devices. That the respondent leases such equipment in competition in interstate commerce with manufacturers of similar equipments who are engaged in the sale of the same in such commerce."

And for ground of complaint assigns:

(1) Petitioner in leasing said pumps stipulates that the retailer shall not use the said "devices" for containing, storing and vending the products of companies other than petitioner. Petitioner claims this is a proper provision because:

(a) There is no reason why the property and capital of petitioner should be used for the benefit of its competitors;

(b) By stipulating that no products other than the products of petitioner may be stored or used in such pumps and tanks, petitioner can have a reasonable assurance that inferior products will not be substituted for the product which it makes, and which is of high character and grade, and which meets the requirements of the laws of the state within which it is sold, and thereby its business name is protected, and its products properly and truthfully advertised.

(c) By making this stipulation, and doing what it can to make the stipulation effective, petitioner keeps the public informed as to the product which it buys and gives it assurance that it will not have imposed upon it gasoline and petroleum products which may be of an inferior character or which, for some other reason, may not be desired.

(d) Petitioner has the choice of directly using the pumps and tanks which it owns or may buy, or of making an arrangement by which its products are offered to and are sold and delivered to the public and its "devices" used therefor. If it should choose the former method no one would insist that there was anything wrong in refusing to handle the products of a competitor; if it should choose the latter it could, with just as much reason, refuse to permit its property to be used for the benefit of a competitor. The purpose of the law is to prevent unfair competition, not to prevent competition. When, by contract, by action of the Federal Trade Commission, or otherwise, all the capital in a field of business is combined, the necessary result is a total destruction of competition.

(2) Petitioner complains of the finding to the effect that the rental or lease charge provided for in the contract is a nominal sum, and that there is no other consideration for the leasing of such equipment, and says that the price or sum received is not the total consideration for the use of the equipment, but that that part of its capital which is invested in its equipment is used in the legitimate development of its business and in providing for the sale of its products, and in giving effective competition to other dealers in petroleum products within the territory in which the equipment is installed; that the equipment remains the property of petitioner to be used in providing some person other than the lessee with proper equipment in case lessee shows a lack of business capacity or of personal integrity, or a lack of ability to efficiently compete with

other sellers of petroleum products in the territory. Petitioner insists that it has the same right to use its capital in the development of its business in this way that it has to establish attractive and convenient delivery stations, or to advertise, or to employ efficient and accommodating men, or to use any other enterprising honest business device for the profitable sale of its products.

(3) Petitioner says that so much capital must be used in the production and sale to the public of gasoline; that in the conduct of this part of its business the best judgment of its officers is exercised in the proper handling of such capital as it has at its command to secure the best and most economical results; that whether its pumps and tanks are installed directly by it or by retailers to whom leases are made the installation is for the purpose of conserving the safety and convenience of the public; that if the retailer is compelled to install and maintain such equipment at great cost the expense will be reflected in the price to the public of the gasoline sold; that the equipment referred to as "devices" is essential to handling the product in the best and safest way; that the cost has to be considered in fixing the retail price of gasoline, and the result to the public is the same without reference to whether the plan criticised by the Commission be used or the charges to the retailer be increased.

(4) It complains of that part of the paragraph which states that such nominal sums of rentals do not afford a reasonable profit to its owner on the amount invested in such devices, and says:

(a) That it should be allowed to exercise its judgment as to whether the plan of business adopted furnishes a reasonable profit on the capital invested and (so long as its course is not dictated by improper or illegal motives) whether it should secure any return.

(d) That it should be permitted to determine the method of spending its money for the development of its business rather than to have the Federal Trade Commission, which lacks the experience of petitioner, to determine whether or not the policy is profitable.

(5) Petitioner excepts to that part of the finding to the effect that respondent leases such equipment in competition, in interstate commerce, with manufacturers of similar equipment who are engaged in the sale of the same in such commerce, and says:

(a) That it is not engaged in the manufacture or the sale or the leasing of such equipment, but that the incidental leases which it makes constitute not only a very small part of its own business but an inappreciable part of the business of manufacturing, buying and selling pumps and storage tanks.

(b) That no person connected with the conduct of its business and no stockholder (so far as is known) is directly or indirectly engaged in any branch of the pump or tank business, or has any interest in such business.

(c) That it is not in competition with manufacturers and sellers of pumps and storage tanks, but on the contrary is, to the exact extent to which it leases such equipment, plus the extent to which it buys and uses without leasing, a customer of the manufacturers and

sellers of such equipment. That while the gross amount of all of its purchases is an unimportant part of the business of manufacturing and selling such equipment, instead of stifling or destroying such business, it exactly, to that extent, encourages and helps said business, and instead of destroying or trying to destroy competition therein, it, as a customer, desires and secures the benefit of the competition which the law encourages and which the Commission is apparently trying to prevent.

(d) That many of the persons to whom leases of such equipment are made would be financially unable to purchase and install such equipment, and by providing the necessary funds for such purpose the petitioner, to that extent, adds to the number of pumps and tanks which can be manufactured and sold.

(e) That during the recent war it was compelled, by the action of the Shipping Board in taking several of its ships, to abandon the selling business in a part of its territory and has been compelled to make expenditures criticised by the Commission and other expenditures in order to re-establish its competition.

Paragraph IV.

4. Petitioner excepts to Paragraph 4 as follows:

"That the respondent sells its said products in various states and territories of the United States in competition with other refiners and wholesale dealers in petroleum products and gasoline, and respondent has practiced the leasing of said devices to retailers in the various states and territories as aforesaid, as a method of competing with other firms, persons, partnerships and corporations also engaged in refining and selling, in wholesale quantities, gasoline, refined oil and petroleum products."

And assigns reasons for exceptions:

(a) That in each of the states in which it does business it is in active competition with other producers in a business strictly intrastate; that its refining is also entirely intrastate and is confined to the refining of its own crude oil; that in the sale of its gasoline (the only product in which the "devices" are used) the course of business of petitioner is direct sale to the general public; this is usually by sales at its own stations by its own employes, but economical and profitable handling of such products sometimes require that arrangements therefor be made with local dealers; that such sales to the public are always in intrastate business; that in no one of said states does petitioner's sale of petroleum products, together with sale of its products by other retailers, exceed 20 per cent. of the total sales;

(b) That in order to make this competition in any sense effective it is compelled to sell to efficient retailers, to provide for the installment of efficient and safe equipment and to show the same degree and character of enterprise in the conduct and development of its business as is necessary to the success of any retail business;

(c) That it recognizes the impossibility of bringing about a monopoly even if it desired to do so;

(d) That in every state in which it is selling petroleum products it has been compelled to establish its business in competition with business already established, and has in every instance furnished the competition the law encourages, and its success is not possible if it is not permitted to use the ordinary methods by which competition is made possible;

(e) That it retains the business which it has, and secures business at places in which it has not theretofore made sales, by the character of its product and of its equipment.

Paragraph V.

5. Petitioner excepts to the findings in Paragraph 5 as follows:

"That the contracts mentioned herein generally expressly provide that said devices shall be used by the lessee only for the purpose of holding and storing the respondent's said petroleum products, and all of said contracts or leases which the respondent has entered into as aforesaid, have been made on the condition, agreement or understanding, that the lessee or purchaser thereof should use the said device for the purpose of holding and storing petroleum products purchased from the respondent. That a small number of retail dealers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid, handle similar products of respondent's competitors, but a large majority of the retailers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid, require and use in the business, only a single pump outfit."

And assigns as reasons:

(1) The terms of the contract, by which leases are made to retailers, stipulates that petitioner's equipment is not to be used in the handling of the products of its competitors, but petitioner insists that this is a proper provision because it is not called upon by any principle of business or law to furnish equipment for competitors, and because, by confining the use of its equipment to its own products, it is able to protect the public against inferior products and to furnish products desired by the public, and is enabled to effectively advertise and make its products known to the public.

(2) Petitioner should not be held for such consequences as may result from the fact that the number of retail dealers who handle similar products of its competitors is small, if it be a fact. If it be a fact, it is neither illegal or reprehensible. It is the purpose and desire of the petitioner when circumstances do not warrant a selling station of its own, to secure proper retailers for the handling of its products. If it can, by the quality of its products and the convenience and safety of its equipment, keep the retailer from installing the equipment of its competitors, a condition is brought about which petitioner should not be criticised for desiring and securing. The contract does not stipulate that the retailer shall not handle the

products of its competitors, nor is there any agreement or understanding to that effect. In a number of cases the retailer has installed equipment not only of petitioner, but of one or more of petitioner's competitors. In no case is the retailer prevented from making like installations by anything done by petitioner. Under the plan by which petitioner makes the lease of its equipment for a small or nominal sum, the retailer is enabled to make like arrangements with petitioner's competitors or, if he can not make such arrangements with its competitors, to employ capital saved by the arrangement with petitioner in the installation of other equipment. Under any arrangement other than that which has in the conduct of its business developed, it would rarely be the case that any retailer would incur the expense of installing more than one set of pumps and storage tanks. But under the plan in use, and in which petitioner participates, many dealers are able to offer the public the products of two or more refiners. Even where the retailer has installed only one set of pumps and tanks, petitioner has (if conditions justify) competition from other retailers who have installed the equipment of competitors; and communities, which would otherwise not have the benefit of competition, are able to secure it.

Paragraph VI.

6. Petitioner excepts to the findings of Paragraph 6 as follows:

"That the respondent has practiced the leasing or selling of such devices upon the terms and conditions aforesaid, for the purpose of obtaining and holding customers, and of preventing its competitors from obtaining as customers, the retail dealers with whom it has entered into such contracts or leases as aforesaid."

(1) Petitioner excepts to that part of the findings to the effect that it has practiced the leasing and selling of such equipment "for the purpose of preventing its competitors from obtaining, as representatives, the retail dealers with whom it has entered into such contracts" because there is nothing in the evidence which has been adduced, nor is there, in fact, such a purpose or anything to indicate such a purpose. The contract entered into does not prevent additional contracts with the retailer, nor does it have the effect to prevent him from making such further development of his business as the conditions warrant, and any development beyond this would be a waste for which either the retailer or the public would have to pay.

(2) In making a contract your petitioner exercises that degree of enterprise that secures and undertakes to hold a customer, and which is essential to its business, as it is essential to all other business. Whatever merit there may be in the non-competitive system is a merit petitioner cannot give or secure without violation of State and Federal statutes.

Paragraph VII.

7. Petitioner excepts to Paragraph 7 of the said findings as follows:

"That many competitors of the respondent do not sell or lease such devices to retail dealers upon the terms and conditions referred to herein, and such competitors have lost numerous customers to the respondent as a result of the respondent's practice of offering and leasing said devices to such retail dealers upon the terms and conditions aforesaid."

And petitioner says as to the findings to the effect that many of its competitors do not sell or lease such devices to retail dealers upon the terms and conditions referred to herein, and that they have thereby lost customers:

(a) That it is the purpose of the anti-trust laws to encourage competition and not to destroy it.

(b) That competition which does not affect the business of another is competition that cannot be to the benefit of the public.

(c) That no concern has a vested right in customers and that all development would cease if it should be established as a principle that when one customer has been secured by a concern no other business would have a right to offer any inducement to the customer to change.

(d) That no business should be penalized on account of lack of capital of its competitors, or the lack of enterprise of its competitors.

(e) That petitioner and others in the petroleum business should be permitted to exercise their respective judgments as to how the business should be conducted. It cannot be that the thoughtful consideration given by them (based upon experience and knowledge) could, with advantage to the public, be superseded by the immature judgment which the Federal Trade Commission (burdened with the conduct of the business of the country) would necessarily exercise.

And petitioner says that the method of business complained of:

(1) Provides a safe and efficient means of selling and delivering gasoline at many points where none but primitive and unsafe methods could otherwise be instituted.

(2) Provides competition where competition could not otherwise exist.

(3) Gives the newer oil companies an opportunity of developing competition with those formerly controlling the business of the country.

(4) Helps another important industry (the manufacturers of pumps and tanks).

(5) Violates no law, infringes no rule of good morals, is at discord with no business principle.

And petitioner says that the order to desist is unjustifiable and illegal governmental interference with a business rapidly and normally developing for the public convenience and good.

And it prays that said order be annulled.

GULF REFINING CO.,
By R. L. BOTTS,
General Counsel.
W. J. GUTHRIE,
Assoc. General Attorney.

In the United States Circuit Court of Appeals for the Third Circuit.

October Term, 1920.

GULF REFINING COMPANY, PETITIONER,
vs.
FEDERAL TRADE COMMISSION, RESPONDENT. } No. 2609.

And afterwards, to wit, on the 4th day of October, 1921, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Victor B. Woolley, and Hon. J. Warren Davis, Circuit Judges, and Hon. Hugh M. Morris, District Judge, and the court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 14th day of July, 1922, come the parties aforesaid by their counsel aforesaid, and the court now being fully advised in the premises, renders the following decision.

In the United States Circuit Court of Appeals for the Third Circuit.

October Term, 1920.

STANDARD OIL COMPANY, PETITIONER,
vs.
FEDERAL TRADE COMMISSION, RESPONDENT. } No. 2599.

October Term, 1920.

GULF REFINING COMPANY, PETITIONER,
vs.
FEDERAL TRADE COMMISSION, RESPONDENT. } No. 2609.

March Term, 1921.

MALONEY OIL AND MANUFACTURING COMPANY, petitioner,
vs.
FEDERAL TRADE COMMISSION, RESPONDENT. } No. 2632.

Separate Petitions to Set Aside Several Orders of the Federal Trade Commission.

Before WOOLLEY and DAVIS, Circuit Judges, and MORRIS, District Judge.

WOOLLEY, Circuit Judge. In these proceedings we are asked to review and set aside three orders of the Federal Trade Commission commanding the petitioning corporations forever to cease and desist from a practice found by the Commission to violate Section 5 of the Act creating the Federal Trade Commission (38 Stat. 717) and Section 3 of the Clayton Act. (38 Stat. 730.) The applicable provisions of these statues are, in the first, "That unfair methods of competition in commerce are * * * unlawful," and, in the second, "That it shall be unlawful for any person engaged in commerce to lease * * * or make a sale * * * of goods, * * * machinery, * * * or other commodities * * * on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, * * * machinery, * * * or other commodities of * * * competitors of the lessor or seller, where the effect of such lease or sale, * * * or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

These are three of a large number of cases involving the same practice. They were tried in three groups. The testimony in one group bore most directly on gasoline marketing in states along the Atlantic seaboard. In another it related particularly to business done by companies within the State of Ohio. In the third it concerned business farther west. As the testimony in all cases was in the main identical, the twelve comprising the eastern group (which includes the cases at bar) were combined and heard together.

The testimony discloses a practice which has been widely pursued in the eastern part of the United States by corporations refining and marketing gasoline. It consists of what is practically a loan, or technically a lease without rental, by a wholesaler to a retailer, of equipment for the temporary storage, measurement and delivery of gasoline to the consuming public. The practice extends mainly to the retailer whose place of business is referred to as a "curb filling station." The leased equipment is known as a "Curb pump outfit" and comprises a sunken tank for the storage of gasoline and a pump of familiar design by which gasoline is drawn from the tank and delivered to motor vehicles. The retailer is the proprietor of the station and is generally engaged in some other business. Typical of

his class are keepers of country stores, residents in hamlets and at cross-roads, and farmers. The practice does not relate to retail stations owned and managed by the refining and marketing companies themselves. These are the more elaborate affairs also familiar to the public and generally known as "service stations." Proprietors of garages comprise an intermediate class of retailers to whom the practice in some measure extends.

The practice held by the Commission to offend against the statutes is found wholly within the terms of the leasing contracts. The form of the contract is important in two respects: First, in what the wholesaler requires the retailer to do; and second, in what it does not require him to do. The form of contract used by the Standard Oil Company is identical in substance with contracts used by the other petitioners. Paraphrased, it is as follows:

Reciting by preamble that the retailer is now purchasing gasoline from the wholesaler for sale to its customers and has requested it to install on his premises equipment for the better storage and handling of the gasoline so purchased, and that in compliance with his request the wholesaler is about to make the installation, it is agreed between them that the "equipment shall be used solely for the storage and handling of motor gasoline purchased by the" retailer from the wholesaler. Then follow undertakings by the retailer that he will maintain the equipment in good condition at his own cost; that he will not encumber or remove it or permit it to be seized or taken in execution; and that he will indemnify the wholesaler from liability for injuries occasioned by leakage, fire, or explosion of gasoline. The contract concludes with four provisions for its termination: First, upon the use of the equipment by the retailer for any other purpose than the storage and handling of gasoline purchased from the wholesaler; second, upon the retailer's failure for thirty days to purchase gasoline from the wholesaler; third, upon the sale of the premises by the retailer; and fourth, by either party upon five days' notice in writing to the other party; with the right of the wholesaler in any event to enter upon the premises and remove the equipment.

Having stated what the contract requires the retailer to do, the things which it does not require of him are equally important. The first is he is not required to pay any license fee, rental or other thing for the use of the equipment; nor is he restricted in his business to the equipment covered by the contract. On the contrary, he may use other equipment leased by competing wholesalers, or purchased by himself. Nor does the contract expressly tie him to the wholesaler's products. He may freely deal in gasoline or other petroleum products purchased from competing wholesalers. He may not, however, use the equipment of the contract for storing and handling a competitor's gasoline.

In justification of their practice the petitioners maintain that the curb pump outfit is a natural development of the oil industry. In this industry the distribution and marketing of petroleum products more or less volatile and therefore more or less dangerous has

always been a serious problem. The petitioners point out that for many years kerosene and other less volatile oils have been sold to retailers in barrels or direct to householders in cans. The barrels and cans being the property of the wholesaler are returned when the contents are removed. When the market for gasoline and more volatile oils developed, the wholesaler for safety shipped them to the retailer in steel barrels or drums. These also remained the property of the wholesaler and were returned when empty. With the marvelous increase of motor vehicles in all sections, urban and rural, there came a corresponding necessity for wider distribution of gasoline. Distribution from large central reservoirs to distant places by barrels and drums was no longer practicable. Then curb filling stations were established and curb pump outfits were installed whereby gasoline is delivered by tank trucks to many smaller centers and there stored and sold. These centers grew in number as the demand spread. At first this demand was met by one station and one outfit. As the demand increased stations and outfits were multiplied, the purpose of the practice, the petitioners claim, being to increase business by making easy and convenient the sale of gasoline to the public everywhere. But outfits cost money and the little storekeeper and the farmer by the roadside could not be induced, and frequently were not able, to invest capital in the purchase of an outfit. The result was that outfits were purchased by the wholesaler and loaned or leased to the retailer at practically no cost to him, yet upon the terms with respect to their use which we have detailed.

The view which the Federal Trade Commission takes of this practice is quite different. Its conclusions based on its findings of fact are that the installation of one outfit either supplies the needs of the retailer or meets the demand of his locality, and that, in consequence, the retailer has neither economic means nor personal desire to permit the installation of more than one outfit on his premises; that the contract for an outfit has the effect of tying the retailer to the products of the one wholesaler so long as one outfit meets the local demand and of substantially lessening competition by enabling the wholesaler to monopolize first one retailer and then, as the contracts are multiplied, to monopolize many thousand retailers, and eventually the whole territory in which they reside. Finding this practice of the petitioners violative of the laws referred to, the Commission entered the orders to cease and desist here under review.

On this statement of facts we shall discuss the practice as it bears on four classes of interested parties. The first of these is the public. The Federal Trade Commission Act, in so far as proceedings thereunder are founded on a public interest, provides,

"* * * if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a com-

plaint stating its charges and in that respect, * * *." (38 Stat. 719, Sec. 5. F. T. C. *vs.* Gratz, 253 U. S. 421).

The petitioners challenge the authority of the Federal Trade Commission to institute and prosecute these proceedings on two grounds as affecting the public interest. The first is, that the complaints do not allege facts necessary to show that public interest is involved. Upon taking this position there arose an issue whether public interest is a matter to be found by the Federal Trade Commission preliminary to the issuance of its complaints, or is a fact to be alleged in the complaints and proved like any other fact. This question, in view of the record, is purely academic, because whether public interest is to be regarded as a consideration moving the Commission to action or a jurisdictional fact to be pleaded and proved in support of its action, the fact of public interest in these cases is abundantly established.

The law of unfair competition in its modern conception regards as its chief concern the effect of forbidden acts upon consumers. The Congress in passing the Clayton Act and denouncing tying contracts and leases obviously had in mind the public as the principal sufferer therefrom. It is true, as said by Judge Denison in Steers *vs.* United States, 192 Fed. 1, in speaking of the Sherman Anti-Trust Act, 26 Stat. 209, that the theory of injury to the public lies at the bottom of the statutes and is directed against things which tend to deprive the public of the advantages which flow from free competition. Having denounced methods of business which are unfair and which substantially lessen competition and tend to create a monopoly, it is clear that in a case of this kind the public is within the protection of these statutes. If under these statutes the practice is illegal, then in truth the public which pays the bill is the main sufferer. As the practice extends to many thousand retailers and comprehends many million transactions through territory comprising more than half of the population of the United States, it is idle to say that the public has not an interest. Therefore, on this contention we think the petitioners have wholly failed to grasp the principle and purpose of the statutes and are entirely wrong in their contention.

The next contention of the petitioners, however, is very different. It squarely meets the issue of public interest and is to the effect that the evidence fails to show that the public has been injured. With this we agree. Postponing discussion of the effect of the practice upon competition and monopoly, we do not find that the practice has increased the cost of distribution or has enhanced the price of gasoline to the public. On the contrary it has decreased the cost of distribution. Whether the price to the public has been reduced, we cannot say. Clearly the public has found an advantage in the practice both in the matter of convenience and in the certainty of getting the precise make of gasoline advertised on the globe of the pump. On the other hand, if the orders of the Commission commanding the petitioners to cease and desist from the practice and thereafter to lease outfits to retailers only on remunerative rentals stand, the in-

evitable result will be that the number of curb filling stations will be reduced, thereby lessening the convenience to the public; or the rental charged the retailer for the outfit will be covered by fixing wholesale prices so as to allow him a larger profit. In the readjustment, the public doubtless will undergo its usual experience of paying higher prices.

The second class of parties interested in or affected by the practice is that of oil refiners or wholesalers, including both the petitioning wholesalers—the leading actors in the practice—and their wholesale competitors. The parts played by the members of this class depend for their legality upon the scope and purpose of the two statutes involved.

The first paragraph of each of the orders of the Commission does not deal with the restrictive clause of the contract; it deals solely with the leasing of outfits for a nominal rental or for no rental at all. One question decided by the Commission and here under review is whether this feature of the contract is an unfair method of competition within Section 5 of the Federal Trade Commission act. Interpreting this section, the Supreme Court, in Federal Trade Commission vs. Gratz, 253 U. S. 421, 427, said:

"The words "Unfair method of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The Act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

Therefore in determining, as matter of law, whether leasing of gasoline outfits without rentals is an unfair method of competition, we shall inquire whether the method is characterized by oppression of competitors or is against public policy because of its dangerous tendency unduly to hinder competition or create monopoly. So also under the Clayton Act, by force of which the Commission framed the second paragraph of each of its orders denouncing the restrictive clause of the contract, we shall, upon the authorities given below, make a similar inquiry with reference to the effect of the practice in lessening competition and creating a monopoly. To make clear the principle upon which we shall examine the testimony and decide these cases, it may be well to observe that the Clayton Act, which is a part of the scheme of laws against unlawful restraints and monopolies, does not wait for its operation until monopolies have been created and restraints of trade established, but seeks to reach them in their incipiency and stop their growth. Yet, in this avoiding an objectionable effect by removing the cause, the Congress did not intend the statute to reach every remote lessening of competition or every dim and uncertain tendency to monopoly. It intended

rather that the Commission, and ultimately the courts, should inquire not whether a given practice may possibly lessen competition or possibly create a monopoly, but whether it probably lessens competition—and lessens it substantially—and whether it actually tends to create a monopoly. The Standard Fashion Company vs. Magrane-Houston Company, — U. S. — Though differing somewhat from other laws, as we have indicated, the Clayton Act, nevertheless, deals with matters within the realm of monopoly. Therefore in determining whether given acts amount to unfair methods of competition within the meaning of the Federal Trade Commission Act, or substantially lessen competition and tend to create a monopoly within the meaning of the Clayton Act, the only standard of legality with which we are acquainted is the standard established by the Sherman Act in the words "restraint of trade or commerce" and "monopolize, or attempt to monopolize," and by the courts in construing the Sherman Act with reference to acts "which operate to the prejudice of the public interest by unduly restricting competition or unduly obstructing the due course of trade," and "restrict the common liberty to engage therein." Great Atlantic & Pacific Tea Co. vs. Cream of Wheat Co., 224 Fed. 566, 573; affirmed 227 Fed. 46; United States vs. American Tobacco Co., 221 U. S. 106, 179; United States vs. Patten, 226 U. S. 525, 541; Eastern States Lumber Asso. vs. United States, 234 U. S. 600, 613, 614; Standard Oil Case, 221 U. S. 1; Standard Fashion Company vs. Magrane-Houston Company, — U. S. —

Applying this standard to the trade practice here involved, the first question, that of unfair method of competition, relates to the leasing of outfits without rentals.

Is this phase of the practice oppressive upon competitors and does it tend to create a monopoly? Concededly, a lease of a curb pump outfit without rental gives a wholesaler a trade advantage over its competitors. This alone is not unlawful, for such advantage is the object of all competition and is attained whenever one sells another goods of greater excellence or at lower prices than goods offered by others. Does this trade advantage contain the seeds of monopoly? It admittedly leaves competitors free to install competing outfits in the same locality and in all other localities. It also leaves every competitor free to place its outfit with the same retailer if it can prevail upon him by the ordinary competitive inducements of better goods, lower prices, and easier terms of credit. That the practice imposes upon a competitor the investment of more capital is an argument which would apply with equal force—and with equal infirmity—to competition based on superiority of goods and liberality of credit.

Under the Federal Trade Commission Act declaring unfair methods of competition unlawful—as the Act stood before the passage of the Clayton Act—a loan of a curb pump outfit without return or a lease without rental did not, we think, tend to create a monopoly, and, accordingly, was not, in our opinion, an unfair method of competition.

But the Clayton Act, when it came along, bore upon another phase of the contract, namely: upon the clause which restricts the use of the leased outfit to the product of the wholesaler, thereby, the Commission found, lessening competition and tending to create a monopoly. Such a clause of a contract, commonly known as a tying contract, is to be construed not by its terms alone but by its effect as well. The Act looks particularly to the consequences. In the United Shoe Machinery Corporation case, —— U. S. ——, the Supreme Court said:

"While the clauses enjoined do not contain specific agreements not to use the machinery of the competitor of the lessor, the practical effect of these drastic provisions is to prevent such use. We can entertain no doubt that such provisions as were enjoined are embraced in the broad terms of the Clayton Act which cover all conditions, agreements or understandings of this nature. That such restrictive and tying agreements must necessarily lessen competition and tend to monopoly, is, we believe, equally apparent * * *. This system of tying restrictions is quite as effective as express covenants could be and practically compels the use of the machine of the lessor except upon risks which the manufacturers will not willingly incur."

The point of similarity between the United Shoe Machinery Corporation case and the cases at bar is that, in both, the offending clauses did not expressly provide against the use of machinery or equipment of competitors. The difference between the contract clauses in the two cases is that as certain machinery of the United Shoe Machinery Corporation was essential to the lessee in his business, the practical effect of the clauses in that contract, although not specifically prohibiting the use of the machinery of a competitor, was absolutely to prevent its use; while the clause of the contract in the cases under consideration related to but one kind of machine or equipment, and extended to a situation which did not impose upon the lessee the necessity of obtaining something from the lessor which was indispensable in his business, the clause, in consequence, did not have the practical effect of preventing the use of equipment of a competitor.

Also, the cases at bar are distinguished from the Standard Fashion Company vs. Magrane-Houston Company, —— U. S. ——, by the fact that the contract in that case contained an express agreement that the retailer should not sell or permit to be sold on his premises any other make of patterns. Here was a restrictive covenant which by its terms came within the third section of the Clayton Act. In discussing this clause the Supreme Court approved an observation in the opinion of the Circuit Court of Appeals, as follows:

"The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands, of small communities amount to giving such single pattern manufacturer a monopoly of the business in such community. Even in the larger cities, to limit to a single pattermaker the pattern business of dealers most resorted

to by customers whose purchases tend to give fashions their vogue, may tend to facilitate further combination: so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business."

It has been suggested that this expression is apposite to the leasing contract here under discussion. But we think the cases are distinguished by the important fact that there the dealer was restricted by the contract to the sale of patterns of one manufacturer. This eliminated from his business all other patterns and tied him to the patterns of the contract. Here he is restricted in the use of the leased outfit to the storage and delivery of gasoline purchased from the lessor, but he is not limited to the use of one outfit, nor is he hampered in the sale of gasoline and other products of other manufacturers. The contract leaves every competitor free to persuade the retailer to install an additional outfit or to replace the outfit already installed by one of its own; and permits the retailer to yield if he chooses. While the effect of the restrictive clause of the contract in these cases may make competition somewhat more difficult because of the inclination of a satisfied retailer to stand by his wholesaler until another comes along and offers him something better, we are of opinion that the clause does not thereby lessen competition between wholesalers to the extent contemplated by the statute and that a tendency to monopolize the wholesale trade has not been disclosed. "That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial." Standard Fashion Company vs. Magrane-Houston Company, —— U. S. ——; Standard Oil Co. vs. F. T. C., 273 Fed. 48; Canfield Oil Co. vs. F. T. C., 274 Fed. 571; Sinclair Refining Co. vs. F. T. C., 276 Fed. 636.

The third class of parties interested in the practice is that of retailers.

Many retailers buy and own curb pump outfits. With these we have nothing to do except to note that by the practice of leasing outfits competition with them is greatly increased. We are concerned only with the retailer who has not money enough to purchase an outfit, or, having money, does not care to risk it. What happens? If his locality promises trade, one of the many wholesalers will supply him with an outfit without cost and without risk to him. The only condition imposed is that he shall not store and deliver through the outfit gasoline of any other wholesaler. The tying element in the transaction, if any there be, is the one arising from human nature and business sense, namely, that the retailer will install no other outfit so long as he is satisfied with the quality and price of the wholesaler's gasoline and so long as one outfit serves his trade. The contract leaves him perfectly free to deal in all petroleum products made by competing wholesalers. He is at liberty to install, by lease or purchase, as many other outfits as he may choose and to sell through them as many brands of gasoline as he may desire. The leasing contract, being terminable by him at will on brief notice, permits him to

change outfits at will, replacing one by another as often in the course of wholesaler's competition as he is induced to do so. The retailer, regarded in the aggregate, is an actor in the practice, who by reason of his number, place and interest causes competition between wholesalers to be increased rather than lessened. If the practice is abridged or abolished the retailer's risk is increased and his number diminished, and, correspondingly, competition is lessened. Certainly the retailer's part in the practice violates neither of the statutes. Nor, for the reasons given, can we think he is monopolized by the wholesaler, or the territory in which many retailers do business under the practice is monopolized.

The fourth class of parties claiming an interest in the practice is that of manufacturers of curb pump outfits. Of those there are a half dozen or more in the country, in none of which the petitioning corporations have an interest. The petitioning corporations do not manufacture pump outfits themselves but purchase them from manufacturers like anyone else. The Commission found as a fact that having purchased outfits, the petitioning corporations then leased them in competition with manufacturers engaged in the sale of like equipment in commerce, and upon this finding drew the conclusion, "That the practice of leasing such devises at a nominal rental * * * is an unfair method of competition in interstate commerce as against the competitors of respondents engaged in the manufacture of such devices, and in the sale of the same for profit, in the territory wherein the respondent leases such devices * * *."

After the manufacturer has sold equipments to the respondents without condition or limitation, and has turned them loose in commerce, we are at a loss to see just how he can be heard to complain that the equipment so sold and paid for is being leased by the owners on terms which make it difficult for him to sell like equipments to others. As there is involved here no question of fraud, deception, good conscience, or even business ethics, we should hesitate to follow business transactions to this length and determine whether conduct so remotely related to the original transaction of purchase is an unfair method of competition.

Having given these cases full and deliberate consideration, we are of opinion that, while the evidence supports some of the Commission's findings of fact as distinguished from the conclusions drawn from them, it does not establish the offences laid in the complaints and founded on the statutes, and, accordingly, does not sustain the orders based thereon. Therefore, we are constrained to set aside the orders and direct that the complaints be dismissed.

MORRIS, District Judge, concurring in part and dissenting in part.

The operative parts of the order of the Commission here attacked are that the respondent forever cease and desist from:

"1. * * * leasing pumps or tanks or both and equipment for storing or handling petroleum products in furtherance of its petroleum business, at a rental which will not yield to it a reasonable

profit on the cost of same after making due allowance f depreciation * * *.

"2. Entering into contracts or agreements with dealers in p petroleum products or from continuing to operate under any co tract or agreement already entered into whereby such dealers agr or have an understanding that as a consideration for the leasing t them of such pumps and tanks and their equipment, the same sha be used only for storing or handling the products of responden * * *."

The first paragraph of the order is directed only to the metho of competition whereby the petitioners lease pumps and tanks t retailers at a nominal rental and is concerned not at all with th restrictive or tying clause of the lease. Divorced from the tyin clause, leasing the pumps at a nominal rental is, in my opinion, practice "never heretofore regarded as opposed to good morals be cause characterized by deception, bad faith, fraud or oppression, nor is that practice against public policy as declared by the She man and Clayton Acts and, consequently, is not an unfair metho of competition within Sec. 5 of the Trade Commission Act as inter preted by the Supreme Court in Federal Trade Commission v Gratz, 253 U. S. 421, 427, even though the leasing of the pumps a a nominal rental may, perhaps, have a tendency to lessen com petition either in the sale of pumps or in the sale of gasoline a wholesale. I am, therefore, in full accord with the views expresse by the majority of the court with respect to the first paragraph o the Commission's order.

The second paragraph of the order rests upon Sec. 3 of the Clayto Act. While Sec. 5, of the Trade Commission Act provides "if i shall appear to the Commission that a proceeding by it * * would be to the interest of the public, it shall issue," &c., no simila provision is found in the Clayton Act. In proceedings under that ac public interest is as conclusively presumed as in a criminal proceed ing and needs to be neither alleged nor proved. Consequently, a I see it, the petition for review presents with respect to the secon paragraph of the order two questions only. First, whether the lease here involved are "on the condition, agreement or understanding that the lessee * * * shall not use or deal in the goods, * * merchandise * * * or other commodities of a competitor of th lessor" and, if so, then, second, whether "the effect of such lease, * * * condition, agreement or understanding may be to substantially lessen competition or tend to create monopoly in any line of commerce," both within the meaning of Sec. 3 of the Clayton Act. The leases contain the following provision:

"That the said equipment shall be used solely for the storage and handling of motor gasoline purchased by the party of the second part from the party of the first part for the purpose aforesaid."

While the foregoing clause does not contain a specific agreement not to use or deal in the gasoline of a competitor of the lessor, yet

the clause falls within the terms of the Clayton Act if its practical effect is to prevent such use. United Shoe Machinery Corp'n, et al. v. The United States (Decided April 17, 1922). Whether the practical effect of the restrictive agreement is to prevent the lessee from using or dealing in the gasoline of a competitor must be determined from the findings of the Commission and the evidence adduced before it, for under section 11 of the Clayton Act its findings of the fact are conclusive, if supported by the testimony. One of the findings of the Commission, supported by the testimony, is "that a small number of retail dealers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid, handle similar products of respondent's competitors, but a large majority of the retailers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid, require and use in their business only a single pump outfit."

With respect to the one pump retailer the restrictive clause in the leases in question is as effective in preventing the lessee from using or dealing in the gasoline of a competitor of the lessor as if the lease expressly so provided. True, the lessee may terminate the lease at the time and under the conditions mentioned therein but that fact does not enable the tying clause to elude the prohibition of section 3 of the Clayton Act for that section operates with respect to short term leases and leases at will in like manner and with like force as it does with respect to long term leases or, for that matter, leases in perpetuity. The legality or illegality of the tying clause is dependent not at all upon the duration of the lease or the manner in which it may be terminated. It is likewise true that the lessee has the right to install another pump of his own or a pump of a competitor, but as his business does not warrant or require more than one pump he has not installed more than one and, consequently, his right is not a practical one but a mere abstract right. The result in my opinion is that in practice the restrictive clause of the leases in question has prevented and prevents a "single pump" lessee from using or dealing in gasoline of a competitor of the lessor just as effectively as if the lease had expressly so provided. Consequently, the lease falls within the prohibition of Sec. 3 of the Clayton Act if the effect of such lease "may be to substantially lessen competition or tend to create a monopoly" in selling gasoline at wholesale. Whether its effect may be to substantially lessen competition or tend to create a monopoly is our second question for consideration. The leases are now in force. The fact that they may be terminated at some future time is not relevant to the issue now under consideration. What has already been said shows that "a large majority of the retailers" require for use in their business only a single pump outfit and the practical effect of the restrictive covenant of the lease under which they operate is to prevent such large majority from using or dealing in the gasoline of competitors of their respective lessors. Thereby free competition among the wholesalers of gasoline has been

and now is restricted not with respect to an insignificant number o retailers but with respect to a large majority thereof and as effe tually as if the leases were in perpetuity and as if they expressl prohibited the lessee from using or dealing in the gasoline of th competitors of the respective lessors.

The petitioners have set us as a reason for the reversal of th Commission's order the excellence of the pump as a means for sto ing and delivering gasoline. But the Commission has not attacke the pump. On the contrary it admits the pump's many advantag and great utility. It denies, however, the right of the petitione to make unlawful contracts with respect thereto or otherwise to us it as a means of stifling competition. The petitioners further urg that the restrictive clause is the only method by which they are en abled to use and adequately protect their trademark. Even if thi contention were supported by the evidence it would be ineffectiv for the petitioners are not at liberty to violate the law of the lan whatever proper result may be the consequence of their so doing The evidence, however, discloses that many pumps are owned b retailers, yet there is no evidence that the name of the gasoline be ing sold through such pumps is not exhibited in the same manne as it is on the leased pumps. Nor is there any evidence that in suc cases the gasoline of one wholesaler has been sold as the gasoline o another. These last contentions of the petitioners are, in my judg ment, wholly irrelevent to either of the two issues presented wit respects to Sec. 3 of the Clayton Act. Again, the petitioners con tend that by means of the leases in question the number of retailer has been substantially enlarged and competition thereby increase rather than lessened. If it be a fact that by means of the leases th number of retailers has been increased such increase was beyon question due to the nominal rental and not to the tying clause an the tying clause is none the less invalid even though accompanie by other clauses that are valid. Furthermore, each increase ob tained by the nominal rental was simultaneously monopolized b the tying clause and competition thereby lessened and not increased

Although not differing from the majority of the court as to th legal principles by which the correctness of the second paragraph of the Commission's order should be tested, yet I find myself not in full accord with their ultimate decision for the only conclusion tha I am able to reach by applying those principles of law to the fact of these cases is that the effect of the restrictive covenant has been now is and so "may be" to substantially lessen competition: that its practical effect of the covenant is to prevent the "one pump" re tailer from using or dealing in the gasoline of a competitor of hi lessor and that, consequently, all "one pump" leases are in viola tion of Sec. 3 of the Clayton Act and invalid.

Endorsements: 2599. Opinion of the Court by Woolley, J., and Dissenting Opinion by Morris, J. Received and Filed July 14, 192 Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit.

October Term, 1920.

GULF REFINING COMPANY, PETITIONER,
vs.
FEDERAL TRADE COMMISSION, RESPONDENT. } No. 2609.

Appeal from the Federal Trade Commission of the United States.

This cause came on to be heard on the transcript of record from the Federal Trade Commission of the United States and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the order of the said Federal Trade Commission in this cause be, and the same is hereby set aside, with direction, that the complaint be dismissed.

VICTOR B. WOOLLEY, *Circuit Judge.*

PHILADELPHIA, *July 14th, 1922.*

Endorsed: No. 2609. Order Setting Aside Order of Federal Trade Commission, etc. Received & Filed, July 14th, 1922. Saunders Lewis, jr., clerk.

UNITED STATES OF AMERICA, ss:

The President of the United States of America, to the Federal Trade Commission of the United States, greeting:

Whereas, lately before the Federal Trade Commission of the United States, before you or some of you, in a cause between the Gulf Refining Company, (defendant below) Petitioner, and the Federal Trade Commission, (plaintiff below) Respondent, and order was entered by the said Federal Trade Commission against the Gulf Refining Company, on the twenty-seventh day of April, 1920, which is of record in the office of the said Federal Trade Commission to which reference is hereby made, and the same is hereby expressly made a part hereof, as by the inspection of the transcript of the record of the said Federal Trade Commission which was brought into the United States Circuit of Appeals for the Third Circuit by virtue of ——— ——— agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

And whereas, in the term of October, in the year of our Lord one thousand nine hundred and twenty-one, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the order of the said Federal Trade Commission in this cause be, and the same is hereby set aside, with direction, that the complaint be dismissed.

PHILADELPHIA, *July 14th, 1922.*

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said petition notwithstanding.

Witness, the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, at Philadelphia, the seventeenth day of August, in the year of our Lord one thousand nine hundred and twenty-two (1922).

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

(Endorsement:) Original File No. 2609. U. S. Circuit Court of Appeals, Third Circuit. No. 4, October Term, 1921. Gulf Refining Company, petitioner, vs. Federal Trade Commission, respondent. Copy of mandate.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, Third Judicial Circuit, set:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original of Vol. I of record and proceedings in this court in the case of Gulf Refining Company, petitioner, vs. Federal Trade Commission, respondent, on file, and now remaining among the records of the said court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 11th day of September in the year of our Lord one thousand nine hundred and twenty-two and of the independence of the United States the one hundred and forty-seventh.

[SEAL.] SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

○

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 637.

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

STANDARD OIL COMPANY (NEW JERSEY).

No. 638.

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

GULF REFINING CO.

No. 639.

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

MALONEY OIL MANUFACTURING CO.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

VOLUME II.

PETITIONS FOR WRITS FILED OCTOBER 5, 1922.
WRITS OF CERTIORARI AND RETURN FILED JANUARY 12, 1923.

(29187, 29188, 29189)

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BEFORE THE FEDERAL TRADE COMMISSION.

FEDERAL TRADE COMMISSION, Complainant, vs. ATLANTIC REFINING COMPANY, Respondent.	Docket No. 131.

FEDERAL TRADE COMMISSION, Complainant, vs. STANDARD OIL COMPANY OF NEW YORK, Respondent.	Docket No. 134.

FEDERAL TRADE COMMISSION, Complainant, vs. MALONEY OIL & MANUFACTURING CO., Respondent.	Docket No. 309.

FEDERAL TRADE COMMISSION, Complainant, vs. PAVANIA OIL COMPANY, Respondent.	Docket No. 312.

FEDERAL TRADE COMMISSION, Complainant, vs. RED "C" OIL MANUFACTURING CO., Respondent.	Docket No. 313.

FEDERAL TRADE COMMISSION, Complainant, vs. KENDALL REFINING COMPANY, Respondent.	Docket No. 316.

FEDERAL TRADE COMMISSION, Complainant, vs. GULF REFINING COMPANY, Respondent.	Docket No. 320.

FEDERAL TRADE COMMISSION, Complainant, vs. HARRIS & COMPANY, ELMER E., Respondent.	Docket No. 331.

FEDERAL TRADE COMMISSION, Complainant, vs. SUOR OIL PRODUCTS CORPORATION, Respondent.	Docket No. 333.

FEDERAL TRADE COMMISSION, Complainant, vs. LOUIS BLAUSTEIN (AMERICAN OIL CO.), Respondent.	Docket No. 335.

FEDERAL TRADE COMMISSION, Complainant, vs. STANDARD OIL COMPANY OF NEW JERSEY, Respondent.	Docket No. 337.

8

FEDERAL TRADE COMMISSION, Complainant, vs. TEXAS OIL COMPANY, Respondent.	Docket No. 373.

New York, N. Y., November 20, 1919, 10:00 o'clock A. M. 9

Before: George McCorkle, Examiner.

Met pursuant to notice.

Appearances:

C. L. Zechiel and Joseph A. Burdeau, attorneys for the Commission.

Peter M. Speer, 26 Broadway, New York City, for Standard Oil Company of New York.

Guy Wellman and J. H. Hayes, 26 Broadway, New York, for Standard Oil Company of New Jersey.

James L. Nesbitt, 17 Battery Place, New York City, for the Texas Company.

Harry N. Mankin, 1005 Morris Building, Philadelphia, for Brown & Williams, attorneys for Atlantic Refining Company.

W. D. Guthrie, for Gulf Refining Company.

Examiner McCorkle: Are you ready to proceed, gentlemen?

Mr. Zechiel: Yes, sir.

Examiner McCorkle: Are the respondents ready? I will call the several dockets:

Federal Trade Commission against Suor Oil Products Corporation; is that represented? (No response.)

Federal Trade Commission against the Pavania Oil Company; is that company represented? (No response.)

Federal Trade Commission against the Standard Oil Company of New York; is that company represented? (No response.)

When I ask if these companies are represented, I mean either in person or by attorney. If there is anybody here in person representing them, please answer.

Federal Trade Commission against Kendall Refining Company; is there anybody here representing that company? (No response.)

Federal Trade Commission against Louis Blaustein (American Oil Company).

Mr. Zechiel: He will not be here.

Examiner McCorkle: Federal Trade Commission against the Gulf Refining Company.

Mr. Guthrie: That is represented.

Examiner McCorkle: Federal Trade Commision against Atlantic Refining Company; is there anybody here representing that company? (No response.)

Federal Trade Commission against the Standard Oil Company of New Jersey; is there anybody here representing that company? (No response.)

Federal Trade Commission against the Maloney Oil & Manufacturing Company. Is there anybody here representing that company? (No response.)

Federal Trade Commission against the Red "C" Oil Manufacturing Company; is there anybody here representing that company? (No response.)

Federal Trade Commission against Harris & Company, Elmer, E.; is there anybody here representing that company? (No response.)

Federal Trade Commission against the Texas Oil Company; is there anybody here representing that company?

Mr. Nesbitt: Yes; James L. Nesbitt.

Examiner McCorkle: We will not proceed immediately because we have informataion that seme gentlemen intend to be here who have not yet arrived—some of the respondents' attorneys.

Whereupon a recess was taken from 10:10 A. M. until 10:30 A. M..

AFTER THE RECESS.

Mr. Zechiel: The Standard Oil Company of New York and the Standard Oil Company of New Jersey are now represented, Mr. Examiner.

Before we proceed further, I would like to make a motion that the case of the Federal Trade Commission against the Texas Company be joined in this hearing along with the other cases. That case was not joined by order of the Commission, on my motion before the Commission.

Mr. Nesbitt: Am I correct in understanding that the testimony to be taken here is consolidated testimony in all of these cases, and the record as regards each company will go up *in toto;* that the case as against each company will be judged on the total record made in these hearings, and that there will be no distribution of testimony as regards any particular company? For instance, there might be circumstances as regards some of these respondents that are different than as regards others, and when the respondents come to put in their cases, if that is done, how will that testimony
17 apply? Will it be lumped together or must all the respondents introduce their cases as one, or as individuals?

Examiner McCorkle: I suppose each company would have a right to look after its own defense.

Mr. Speer: I apprehend, Mr. Examiner, that while the testimony is to be taken and to be applied in all the cases, yet testimony that is not applicable to a particular case would not be considered in that case?

Examiner McCorkle: That is correct.

Mr. Nesbitt: The only point I have in mind about that, Mr. Examiner, is that there might be some difficulty, in examining a large record such as will
18 probably be made here, in deciding just what part of that testimony applies to what company and what does not. I can easily see that it would make a great duplication of testimony, however, if it were to be taken as against each one of these respondents. I was just inquiring as to how the testimony would be handled.

Mr. Zechiel: In explanation, to satisfy your own mind about it, I may say that there will probably be very little evidence introduced that will not go generally to the question involved: that is about all we are taking testimony on. Most of the rest of the facts are either admitted in the answers or will be admitted

or stipulated; so that it will be fairly free from anything except the general economic situation which will apply generally throughout the whole territory. Therefore, wherever the evidence is applicable on that question, or on a question of jurisdiction which might be involved, the testimony will go to all the cases to which it will be applicable.

So far as defense is concerned, the practice in the Ohio hearing was, where we had fourteen respondents —there are only twelve here—in the Ohio hearing the practice was that the respondents introduce evidence for the benefit of all the companies, my motion. 20

Mr. Zechiel: I will call Mr. Fox.

Testimony of George F. Fox.

GEORGE F. FOX was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct-examination, by Mr. Zechiel:

Q. State your name please. A. George F. Fox.

Q. What is your address A. 244 Madison Avenue, New York.

Q. With what concern are you associated ? A. The Indian Refining Company. 21

Q. How long have you been with the Indian Refining Company? A. Twelve years.

Q. Did you have any experience generally in the oil industry prior to that time? A. Eighteen years with the Standard Oil Company.

Q. That is the New York Company? A. No; that was the Standard Oil Company—it was originally the Consolidated Tank Line Company, and then the Standard Oil Company of Kentucky, and then, about the last two years, the Standard Oil Company of Ohio.

Q. Since you have been with the Indian Refining Company, what have been your duties? A. From the

22 *George F. Fox, Direct*

time I went with them I had charge of their station distribution, and now I have charge of the entire distribution.

Q. What is the territorial extent over which your company does business? A. Refined oil and gasoline, practically all of the states of the United States east of the Mississippi River.

Q. Your general business is the sale and distribution of refined oil and gasoline? A. That, and automobile oil products.

Q. In connection with your sale and distribution of
23 refined oil and gasoline, have you ever handled what is commonly known as the curbstone pump oil tank and pump outfit? A. We have not.

Q. Have you had, during the course of your experience in the oil industry, an opportunity to come in contact with the general sale and distribution of gasoline in the various states in which your company does business? A. Yes, sir.

Q. What has been your general experience along that line? A. I have practically dictated the policy that our company have pursued since I have been with them.

Q. During that time have you travelled about over
24 these various areas? A. Yes, sir.

Q. And in that connection have you had occasion to visit various retail stores or garages and other places which retail gasoline? A. No; I did not put my time in in connection with visiting garages. My duties would be more particularly in connection with the local representatives who did look after that class of work.

Q. And that connection it is a fact that reports were made to you as to conditions among the retailers? A. Yes, sir.

Q. Are you acquainted with the general practice of leasing and loaning oil tanks and pumps for a nominal

consideration under what is known as tying conditions or contracts in the oil industry? A. I am.

Q. In connection with your business for your company you may state whether or not your company has ever lost customers because of the refusal, upon request, to install oil tanks and pumps for a small or nominal consideration. A. We have lost customers without number; any quantity of them.

Q. Could you estimate, in a general way, about the number? A. I would say at the very least that twenty-five per cent of the gasoline business that we developed each year has been lost on account of our refusal to 26 install storage.

Q. To whom, generally, do you sell your product? A. We specialize in the sale of gasoline to the garage men; the garage men and the filling stations; that is, we do not cater to the consumer.

Q. Do you, in connection with your business, have what is commonly known as service stations owned by your company? A. We have no service stations whatsoever. At some few of our tank stations, we may have a pump at our plant, but we have no service stations, in the strict sense of the word.

Q. Then to what do you refer when you sell through filling stations? A. There are a great many parties 27 around the country who will deal principally in oil and gasoline as a distinctive line of business, compared with the garage man who will also deal in oil and gasoline, and will also store and repair motor cars.

Q. Is there any difference, so far as the method of distribution is concerned, between the garage business and the filling station business? A. There is none so far as the distribution of gasoline is concerned.

Q. Who are your competitors in your territory? A. Everybody selling refined oil and gasoline.

Q. Are you in competition with the Texas Company? A. We are.

28 *George F. Fox, Direct*

Q. Do you know in what areas you are in competition with that company; in what places? A. Principally in North Carolina, Virginia, New York State, Illinois and Louisiana.

Q. Do you sell in Tennessee? A. Yes, sir.

Q. The Texas Company are not your competitors there though? A. I do not think the Texas Company are located in Tennessee. I might add the State of Alabama, there, to the list that I gave a moment ago.

Q. In connection with your business, does your company make a practice of advertising its gasoline
29 through the curb station pump? A. We do not make a practice of doing it. We will furnish Indian gasoline signs to the garage man when he requests it.

Q. What sort of a sign is that? A. It would be a small metal sign, about ten inches wide and about fourteen inches long.

Q. You have never used the electric bulb sign that is commonly placed on top of the pumps? A. No, sir—well, we do not furnish anything like that for regular equipment. We have some few requests, I would say—take the territory we have operated in, I would say take over a period of the last three or four years, and the total requests for an item of that kind
30 would not exceed six in number.

Q. As to the gasoline which you handle and sell to the public, do you sell various kinds of gasoline, or is it all one grade of gasoline? A. Practically all one grade.

Q. Do you think that the leasing and loaning of oil pumps and tanks for a nominal consideration, under contracts not to use through such pumps, any gasoline of a competitior, is a fair business practice in your territory?

> Mr. Speer: I wish to object to the testimony as incompetent and immaterial. The witness should be confined to facts as to what is being done by the companies.

Mr. Guthrie: I make the further objection that he has not qualified as an expert sufficiently to give an opinion.

Mr. Speer: My position is that even if he did qualify as an expert, he is not entitled to give an opinion.

Examiner McCorkle: Our practice is to note the objection of the attorneys to the question, and the objection is overruled, and the witness will proceed. These matters come up finally for adjudication before the Federal Trade Commission. 32

Mr. Nesbitt: May I have the question read?

(The reporter repeated the question as above recorded.)

Mr. Nesbitt: Mr. Examiner, another objection can be made to that question: It is simply asking whether the practice is lawful or not, pretty nearly. That is what he is coming down to.

Examiner McCorkle: The Objection is noted.

Mr. Burdeau: I would like to say, Mr. Examiner, that in these cases particularly the commission has made it a practice when they were 33 hearing evidence themselves, to receive opinion evidence from gentlemen who were shown to be acquainted with the oil business.

Mr. Zechiel: Before the witness answers that' I would like to ask him several more questions.

By Mr. Zechiel:

Q. You say you have been engaged in the general oil business for a period of eighteen and twelve years, Mr. Fox? A. Yes, sir.

Q. And during the past twelve years it has been your business to dictate the sales policies of your company? A. Yes, sir.

34 *George F. Fox, Direct*

Q. During that time, to what extent have you studied the general question of sale and distribution of gasoline? A. That is what I was being paid for, so I would say that I certainly must have studied it.

Q. In that connection, did you study the effects of practices upon various oil companies, generally, or confine yourself only to the Indian Refining Company? A. I confined myself to the effects it would have on the Indian Refining Company's business.

Q. In that connection, did you ever study the question of leasing or loaning pumps for a nominal con-
35 sideration, under these tying provisions, with a view to adopting it for your company? A. I did.

Q. And in considering it from that point of view, to what extent, if any, did you investigate the practice as followed by other oil companies? A. I naturally received reports from our field men as to just what was being done.

Mr. Speer: It seems to me that "tying provisions" is too indefinite. The witness might have one idea of tying contracts, and we might have another.

Mr. Zechiel: I will confine the question more specifically. You were objecting to the
36 last question?

Mr. Speer: Yes.

Mr. Zechiel: I should like to supplement that objection. "Tying agreement" is supposed to have some—

Examiner McCorkle: I understand that Mr. Zechiel withdraws that question?

Mr. Zechiel: Yes. I wish to substitute another question for it. I will put the question in this way:

By Mr. Zechiel:

Q. In that connection, did you ever study the question of leasing and loaning pumps for a nominal consideration, under the condition or understanding that

the leasee of such pump was not to use in connection with the pump or the tank, or sell through the pump or from the tank, or place within the tank gasoline products of any other company or any other concern than that leasing or loaning the pump? A. I did.

Q. To what extent did you make such a study? A. To a very considerable extent.

Q. Could you go into that more in detail, Mr. Fox? A. As the distribution of gasoline, say over the last ten years, has gotten to be more and more practically the back bone of the oil industry, we naturally went into it to a very great extent. 38

Q. Did you study the practice as used by other oil companies? A. Yes, sir.

Q. Were any of those companies small companies? A. To be really frank, as a general proposition, we did not pay so very much attention to the policy of the small companies. We would naturally be guided more particularly by what such companies as the Standard Oil Company, the Gulf Refining Company, the Texas Company, and in the later years, the Sinclair Refining Company would do; I mean the various Standard Oil Companies when I say "Standard Oil."

Q. In that connection, did you consider the practice from the point of view of the amount of capital neces- 39
sary to be invested in order to carry on the practice? A. You mean the amount of capital that we would have to invest?

Q. Yes. A. I should say not.

Q. Was the question of the amount of capital a consideration in your investigation? A. Nothing further than that, naturally, if you are going to spend a certain amount of money to properly conduct your business, you are going to spend it in a way that you thought was going to bring you the best results.

Mr. Zechiel: Now, I would like to have my former question read, to which objection was made.

40 *George F. Fox, Direct*

(The reporter repeated the question as follows:)

"Q. Do you think that the leasing and loaning of oil pumps and tanks for a nominal consideration, under contracts not to use, through such pumps, any gasoline of a competitor, is a fair business practice in your territory?"

Mr. Guthrie: There have been some additional questions with a view to establishing the competency of this witness, and I wish to re-
41 new my objection as incompetent, as the evidence now being offered is incompetent and irrelevant and the witness has not yet shown sufficient judgment to qualify as an expert, and is not entitled to give an opinion.

Examiner McCorkle: The objection is overruled.

Mr. Nesbitt: Will it be necessaary for the different respondents to record objections?

Examiner McCorkle: I do not think so; no, sir.

Mr. Nesbitt: Will the one objection apply to all respondents?

42 Mr. Zechiel: Let it be so understood.

Examiner McCorkle: Yes; it may be so understood.

(After an informal discussion.)

Mr. Zechiel: Now, I would like to have my quuestion again read.

(The reporter repeated the question referred to as follows):

"Q. Do you think that the leasing and loaning of oil pumps and tanks for a nominal consideration, under contracts not to use, through such pumps, any gasoline of a competitor, is a fair business practice in your territory?" A. I do not.

By Mr. Zechiel:

Q. What are the reasons for your opinion in that respect, Mr. Fox? A. I think that it is unfair for the reason that it is practically buying you a man's business.

Q. Do you have anything further to say in answer to the question along that line? A. Nothing except that that is proving out in practically every instance, when a customer to whom we might have been selling gasoline year in and year out, which gasoline was strictly satisfactory to his consumers, that when such customer is approached with the leasing at a nominal sum proposition, or the furnishing free of a tank, that if we did not meet such propositions —and we did not meet them—it, in practically all cases, resulted in the immediate and total loss of that business. 44

Q. What were the reasons why you, for your company, refused to adopt this as a method of competition? A. Naturally we are in business to make money. If we had to spend money, we would like to spend it in a way to get the most out of it, figuring, of course, that whichever way we spent it we had to give due consideration to our future business, which naturally meant to consider what effect the policy we adopted would have upon the retaining of our customers. 45

Mr. Burdeau: I understood you to say that you had at one time considered the adoption of this loaning or leasing plan, and had rejected it?

The Witness: I would not just say that. I would say that, coming down the lane of years, we considered the various methods being adopted by our competitors.

Mr. Burdeau: You know that a number of oil companies with whom you are in competition have

46

adopted the plan of leasing or loaning pumps for a nominal consideration?

The Witness: Sure.

Mr. Burdeau: You recognize that the purpose of that scheme or plan is to get customers and keep customers, do you not?

Mr. Guthrie: That is objected to. It is perfectly absurd for the attorney to suggest testimony in that manner, even at a hearing of this character.

47 Examiner McCorkle: Yes. Do not lead the witness.

Mr. Burdeau: May I ask you what is generally understood in the oil business as to the purpose of these pump and tank contracts?

The Witness: The purpose was to take away from any company that would not follow that same plan the business that they already had.

Mr. Speer: I wish to object to the question as to the purpose of these companies. I do not think the witness is qualified to give an opinion upon that. He should be confined

48 to the facts.

Examiner McCorkle: I think that objection is well taken.

Mr. Burdeau: As to a general understanding in the trade with which he is familiar, Mr. Examiner, is not that a fact?

Examiner McCorkle: If he can state the purpose and is willing to make that statement under oath, I will have to let him state it, but if he does not, that is a pretty far-reaching thing to state.

Mr. Burdeau: What I want you to bring out, Mr. Fox, is, with the knowledge that your competitors were using this practice, why did not the Indian

49

Refining Company adopt it to meet such competition?

Mr. Nesbitt: I object. That is telling the witness, almost, what he is to say.

Mr. Burdeau: Oh, no. I can put a hypothetical question to a man who has qualified himself as an expert in the oil business and in the distributing branch of the oil business. I think there can be no doubt that Mr. Fox has fully qualified himself to testify as to the practices and plans and methods of distributing gasoline.

50

Examiner McCorkle: It seems to me that Mr. Fox has been over that. I will permit the witness to answer the question, however, under objection.

The Witness: We did not consider the leasing or loaning of tanks as a good business practice because, on an even basis, the average oil company should be able to maintain and secure their shares of the business.

The practice of loaning or furnishing tanks free was one that meant if you endeavored to retain the major part of your business by meeting such practice, your competitor who might loan these tanks, or give them away, would simply go you one better by either furnishing a better or more costly tank, or putting in an additional tank for his own product. We considered that the average distributor of gasoline could and should furnish his own facilities. We were willing to take our chance on securing a fair volume of business on that basis.

51

CROSS-EXAMINATION by Mr. Nesbitt:

Q. Mr. Fox, how long did you say you had been with the Indian Refining Company? A. Twelve years.

52 Q. Will you be good enough to tell me the capitalization of the Indian Refining Company? A. Six million dollars. There has been an increase of some eight million dollars, but I do not think it has been issued.

Q. That brings it up to— A. As I say, I do not think it has been issued. I know it has not been issued.

Q. Your business is the marketing of gasoline and refined oils? A. And all products of petroleum, including the refining of the same. When you say
53 "your business," you mean the business of the Indian Refining Company?

Q. Yes. A. Yes.

Q. Has the business of the Indian Refining Company expanded since you have been with the company? A. Yes, sir.

Q. Can you give us an idea about the rate of the expanding of the business annually during the period of your service with them? A. Not unless I have to. This is a competitive meeting, here.

Mr. Burdeau: I will object to on that ground.

54 The Witness: I do not believe I should expose our business here where you can pick it to pieces unless I have to.

By Mr. Nesbitt:

Q. I do not intend to urge it with any such view as that in mind, but I should be glad if you would give us an idea of the rate of increase of your business during that period.

Mr. Zechiel: I do not see how it is material. It is asking for a sort of information that the oil companies, as competitors, are not entitled to.

55

The Witness: I do not mind saying that it has increased. I will give you that much, to come back with your next question.

By Mr. Nesbitt:

Q. I will withdraw the last question, then, and let Mr. Fox's answer stand—this last answer. About how long has the use of the tank and pump been in effect? A. I would say that it started within the last ten years. It has increased the last five years very much more in proportion than it had the previous years. For instance, I left the Standard Oil 56
Company of Ohio in 1907, at which time I was manager for them at Cincinnati, Ohio, and we had no tank proposition at that time. When I say "we," I mean they had no tank proposition at that time.

Q. How long ago was that? A. 1907.

Mr. Zechiel: By that he means under these leasing contracts.

The Witness: All through this testimony, I mean this general proposition.

By Mr. Nesbitt:

Q. I meant, how long had the facility of the pump 57
and the tank used in connection with it been in use? A. I would not want to specify the particular year, but it has come in within the last ten years; I should say more particularly within the last five years of that ten.

Q. And during all the time of the use of the pump and the tank in connection with it, your business has expanded; is that correct? A. Yes; our gasoline business has increased each year.

Q. You have been getting your share of the business in each territory where you have been marketing? A. Yes; but we have not been getting it the way the fellow that has put in the tanks has.

58 *George F. Fox, Cross*

Mr. Nesbitt: I object to that answer.

Mr. Zechiel: Oh, I think the answer ought to stand by all means.

Mr. Nesbitt: I move to strike out the last part of that answer; the last clause of the answer.

Examiner McCorkle: The motion is overruled.

Mr. Nesbitt: It is not responsive to my question.

Mr. Zechiel: I think it is quite responsive.

59 By Mr. Nesbitt:

Q. I will ask you, Mr. Fox, again, to tell me the rate at which your business has expanded? A. I will not answer that unless I have to.

Mr. Burdeau: I make formal objection to that.

Examiner McCorkle: The witness need not answer as to the rate. The attorney for the oil company stated, a few moments ago, that he was satisfied if he would state that it had increased.

60 By Mr. Nesbitt:

Q. Has your business been withdrawn from any territory, during the last five years, where you were previously competing? A. It has not been withdrawn; it has been curtailed in some sections.

Q. You are still doing business everywhere that you were doing it five years ago? A. I do not want to say that, exactly.

Q. I am not talking about a single station but— A. We may have some four or five stations, during the last ten years, that we may have opened up and then, later, closed.

Q. But no territory from which you have withdrawn? A. No, sir; no general territory.

Q. How long has it been since you last considered adopting the practice of leasing at nominal consideration tanks and pumps? A. I would say since the tanks and pumps came in it was almost our daily bread—the proposition of considering what you are going to do.

Q. If you are willing to do so, I should like you to say again why it was you decided not to adopt such policy of leasing pumps and tanks at a nominal consideration? A. That answer is in there.

Mr. Burleau: It is quite proper for counsel to ask you to repeat it. I would like to have you do it.

The Witness: I have practically answered that question twice.

Mr. Nesbitt: All right.

The Witness: I do not know of anything further that I can say.

Mr. Zechiel: If the counsel is insisting on the answer by Mr. Fox, I think our record ought to be kept straight and that Mr. Fox should answer.

Mr. Nesbitt: I am not insisting on it. I asked if he were willing to say again what he said before; that is all.

The Witness: I can give you, perhaps, a little more information than I gave you before, if I keep on. I think I have said that I have considered the furnishing of the tanks practically the buying of a man's business.

By Mr. Nesbitt:

Q. Is that all? A. I have considered it unfair because it bound the garage man who formerly bought part of his supplies from one or more companies to

Buy them exclusively from the company that was furnishing the tanks.

Q. Do you have a trade-mark? Does the Indian Refining Company have a trade-mark? A. Yes. That is, we have a trade brand. We have a grade of gasoline, Indian gasoline.

Q. You endeavor to connect that mark with all retail sales of your product? A. All of our tank wagon tickets, all of our signs—whenever we can use the value of a name in connection with gasoline, we sell it as Indian gasoline.

65 Mr. Nesbitt: That is all.

By Mr. Guthrie:

Q. We are not intended to understand you as stating that you refused to adopt this policy on the part of the Indian Refining Company for any other reason than for matters of economy and profit in the management of your business; is that correct? A. No; that is not correct. I stated that I did not believe that it was a fair practice.

Q. Is that the reason that the Indian Refining Company did not adopt it? A. If you are going to run business just for reasons, instead of giving some
66 consideration to the dollars and cents, you will not get very far.

Q. Then is it not a matter of fact that you, and the other managers of your company, considered that it was more profitable for the Indian Refining Company not to adopt this practice than to adopt it? A. I said somewhere there—

Q. I am not asking you what you said. I am asking you to answer this question, please.

(The reporter repeated the question as above recorded.)

The Witness: From the standpoint of both dol-

67

lars and cents and the future of our business, and the maintaining of the goodwill of our customers.

Mr. Guthrie: I would like to have a more specific answer to that question. Your answer is not responsive, at all, to my question. It can be answered yes or no.

(The reporter again repeated the question as above recorded.)

The Witness: No.

By Mr. Guthrie:

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Q. Do you, then, consider that it would be more profitable for the Indian Refining Company to adopt this policy than not to adopt it? A. No.

Q. Those two answers are not consistent. A. I want to clear the atmosphere. We did not consider it from strictly a dollars and cents standpoint only.

Q. You considered that it was more profitable to adopt the policy that you did adopt, and not to put in pumps and tanks on these nominal rentals? A. Yes, sir.

Q. And that is the reason you have not adopted the plan that the other large companies have adopted in this matter? A. I just got through saying, there, 69
that we considered that in connection with the other proposition.

Q. But that was the dominant factor that led to your conclusion, was it not? A. I cannot say that it was. The dominant factor in connection with the marketing of petroleum products is what effect is the policy that you are going to pursue going to have on your business, not only at this time but in the future.

Q. Yes. You stated, in your examination in chief, that you had lost annually twenty-five per cent of your business: is that correct? A. I did not say that.

70 *George F. Fox, Cross*

Q. I understood you to say that. A. Oh, no. I said that it curtailed the business to the extent of—

Q. You stated, did you not—

Mr. Zechiel: Let the witness finish his answer.

Mr. Guthrie: I thought he was through.

The Witness: Say twenty-five per cent of whatever gallonage we may have had from a given number of customers. Naturally, as we were conducting a progressive business, if we lose gallonage for any
71 reason whatsoever, we do not simply stand still, but must devise ways and means of getting a sufficient volume to replace that which was lost.

By Mr. Guthrie:

Q. Did I or did I not understand you to say, in chief, that this practice of leasing pumps by your competitors resulted in the loss of twenty-five per cent of your customers annually? A. I did not say that.

Q. Did you or did you not make that statement? A. I never mentioned the word customers until just now.

72 Q. Did you make the statement that it resulted in the loss of customers without number to your company? A. I guess I did.

Q. Is it not a fact that your company, during the last five years, has sold all the gasoline that it produced or purchased? A. I will say that we sold more than we produced.

Q. Yes. A. I will say, also, that almost every other oil marketer did the same thing.

Q. Is it not a fact that your company has not lost one single gallon of sales by reason of the introduction of these pumps and tanks during the last five years? A. We have lost an immense amount of gallonage that we can trace directly—the loss of which

73

can be traced directly to the pumps that were furnished free or leased under these arrangements.

Q. But every gallon that you have lost you now state you supplied a trade for, a market for, and disposed of? A. Yes; but we did not supply it to the customers that we originally had.

Q. The fact of the matter is that you disposed of all the gasoline you had and could have disposed of far more than you had to sell in the last five years? A. I will not say that we could have disposed of a lot more than we had, because if we could have done so, we naturally should have done so.

74

Q. Well, you did dispose of all that you had? A. I do not consider that to have anything to do with the volume of business, for the reason that, for instance, we do both a wholesale or tank car business and a regular station business.

Q. Then, as a matter of fact, Mr. Fox, the Indian Refining Company has not suffered any actual loss— A. Oh, yes we have—

Q. In its business, by reason of the custom complained of? A. Oh, yes, we have.

Q. I would like you to explain that. A. If you had one hundred customers that were buying a nice round lot of gasoline from you and you lost the major part of them, you certainly do not have that original one hundred customers.

75

Q. You do not mean to suggest that the customers of any large oil company are constant and unchanging? A. I mean to say this: That over a period of a good many years, under normal conditions, the output that any company operating a string of stations will have, of not only gasoline but kerosene and other products, based on a normal increase in the demand, which will be based to a considerable extent, in the case of gasoline, on the number of new automobiles that are manufactured, can be forecast

76 *George F. Fox, Cross*

with a certainty that is almost astounding.

Q. That is the volume? A. Yes.

Q. But not the individual customers. A. You cannot get volume unless you come somewhere near retaining your original customers.

Q. Do you not have a continually active sales force visiting customers, and you are losing customers and taking on new customers daily? That is an incident of the business? A. Unless I have to answer that kind of questions, I am not going to show here just how and why we do things. I will answer any ques-
77 tion about whether we do it or not; but not how, unless we have to.

Q. Well, then, do you do it? A. What was your question?

Q. Oh, I will not insist on an answer. A. I will answer anything that you have.

Mr. Guthrie: That is all.

By Mr. Speer:

Q. Mr. Fox, the modern use of and demand for gasoline universally, is quite a recent development, is it not? A. As compared with the old days gasoline, of course, in those days was used more particularly
78 in stoves. Gradually, as the consumption increased, that used in stoves decreased, and that used in the automobiles, and in the last few years tractors, has increased by leaps and bounds.

Q. There was not much demand for it generally in stoves, either? A. Yes, there was a good demand for it in stoves. For instance, there was a demand, in a place like Cincinnati, back twelve or fifteen years ago, sufficient to maintain an equipment of delivery wagons that would have served a radius of, say, ten miles, and required an equipment of, say, about eighteen or twenty vehicles, that would have had an aver-

age daily output of, say, six hundred gallons per day.

Q. That was local use. It was not used generally over the country? There was not a demand for it everywhere? A. The Standard Oil Company of Cincinnati had one piece of equipment that served a certain route and, even in the days of stoves and before the automobiles came in, this wagon had an output of very close to 1,500 gallons per day.

Q. I am speaking of the country, generally, now, Mr. Fox. That was in that particular place. A. That was a fair exhibit of the country generally except, possibly, the east here, concerning which I knew nothing. My experience while with the Standard Oil Company covered marketing in Ohio, Indiana, New Orleans, Kentucky; and I would say that the amount of gasoline that was consumed was quite some factor. 80

Q. A very small amount in proportion to what is used now, however? A. "Small," of course, can mean anything.

Q. Make it definite if you wish—as definite as you please. A. I would rather not answer that. Statistics will show. For instance, inspections in states like Ohio and Indiana, of gasoline in those years, as compared with the later years, would give that information exactly. 81

Q. You have spoken several times in your testimony of the Standard Oil Company. As I understand, you have been referring, when you spoke of it in that way, to the Standard Oil Company of Ohio? A. Oh, no. I have made the statement that where I referred to the Standard Oil Company I meant whatever Standard Oil Company may have been doing business in the section in which we came in competition with them.

82 *George F. Fox, Cross*

Q. You spoke of certain territory where you had met competition in this matter of pumps with the Standard Oil Company, such as Virginia and North Carolina and others of the southern states. What Standard Oil Company did you refer to? A. Well, I referred to all of the Standard Oil Companies. For instance, in Ohio, it was the Standard Oil Company of Ohio; if we came in competition in New York State or Connecticut, it was the Standard Oil Company of New York; if we came in competition in Louisiana or Tennessee, it was the Standard Oil Com-
83 pany of Louisiana; if we came in competition in Kentucky, Alabama, or Georgia, it was the Standard Oil Company of Kentucky; in North Carolina, Virginia, West Virginia, Maryland, it was the Standard Oil Company of New Jersey; in Pennsylvania we came in competition with the Atlantic Refining Company.

Q. As I understand, your company does not operate any filling stations at all? A. No, sir, except, as I have stated, so that the matter is not understood or the testimony does not become conflicting, that we do have, at some few of our stations, a pump at our plant.

84 Q. That is where you have your manufacturing plant? A. At our railroad tankage plant.

Q. But you have never established what we call service stations in the towns? A. No, sir.

Q. And operated them yourselves? A. No, sir.

Q. That is quite a common practice, is it not? A. Yes, sir.

Q. When a company goes into a town and establishes a service station of that character, of course you cannot sell any gasoline to them, can you? A. No, sir.

Q. And that takes away, if you had been doing business in that town, it takes away some of your

trade, does it not? A. There is no particular reason to figure why—

Q. Answer my question, please. I asked you if that does not take away some of your trade. I want the fact. A. Not necessarily so.

Q. When the gasoline began to be used in gas engines and automobiles, generally, and the use of automobiles became so common, it created a demand for it practically all over the country, did it not? A. Yes, sir.

Q. Almost every individual, even the farmers, now has an automobile; isn't that a fact? A. Yes. 86

Q. And they all need gasoline? A. Yes.

Q. At the beginning of the business, when this demand arose, you would go into a territory to supply the demand, would you not? A. To supply part of it.

Q. Usually, at the beginning, the man who got in first would have, for a time, a practical monopoly of the business, would he not? A. Yes; that was always the Standard Oil Company, because they are everywhere.

Q. When did you begin to operate? A. 1907.

Q. Had the use of automobiles become common then? A. They were commencing to come in quite 87 generally.

Q. Then this large demand for gasoline arose. Did you not then begin to develop your business, and try to get business in different localities? A. We were in the oil business.

Q. Then you can answer the question. That is a fact, is it not? A. Surely.

Q. Is it not a fact that usually before other companies had gotten into a community, that one company would practically have a monopoly of the business, for a little while? A. Well, if there was but a single company there, yes.

88 *George F. Fox, Cross*

Q. And, as a fact, back six or seven years ago, there were not so many companies in any locality engaged in business as there are now? A. No, sir.

Q. And the fact is that during late years the competition has increased in that way so that there are more people doing business than before? A. Yes.

Q. More companies? A. Yes.

Q. That is a fact, is it not? A. Yes.

Q. So that, in all this territory where you operate, there has been an increase of competition in that way in the last few years, has there not? A. Yes.

89 Q. And more companies engaged in it? A. Yes.

Q. And a great many of them are using filling stations of their own, which they control in some way or other, are they not? A. Yes, sir.

Q. You have never taken up that practice, of having filling stations, either by leasing them or establishing them yourself have you? A. We have not.

Q. You have not attempted to bring your product to the ultimate consumer yourselves, have you? A. Except through the garage man.

Q. So that you have been doing business in this way: You are selling more to the local dealers and allowing them to do the distributing, are you not?

90 A. Yes.

Q. Is it not a fact that those two methods of doing business exist in nearly every line? Some wholesalers sell to local dealers, and do not make any effort to reach the ultimate consumer themselves, that is, as a general practice? A. Yes.

Q. And other dealers, other manufacturers and dealers in products, who have worked up a brand of their own that they think the public will want, instead of using the local dealers, are establishing their own distributing agencies and bringing their product direct to the consumer? That is another way of doing business, is it not? A. Yes.

Q. The effect of this method of having so many

91

filling stations where gasoline is sold under the name of the company that manufactures it, is bringing to the ultimate consumer that product by the manufacturer himself, rather than through the local dealer; that is a fact, is it not? A. Yes.

Q. And naturally, if he develops business of his own, it will take some of it away from the local dealer, will it not? A. Yes, sir.

Q. And that is practically what has happened in your case? As you have been selling to local dealers, and not establishing a marketing system of your own to the ultimate consumer, you have lost, in certain 92
places, some of the business that you might have got if this other method had not come in? A. Yes; that is true; but we would not have lost any appreciable amount of our business in that way. The business that we have directly lost has been on account of the garages and filling stations who formerly had tanks of their own, and with which they were satisfied, being offered and furnished practically free, expensive outfits, and upon the understanding, naturally, that they would then have to quit buying from us and buy from the concern that furnished such tanks.

Q. When you speak of what has been called here a "tying agreement," do you refer to an agreement 93
where a contract is made with the user of the equipment that he must not buy anybody else's gasoline? A. I refer to the general practice that has been followed by the large companies who have been furnishing these tanks for a nominal sum, giving them free or leasing them.

Q. Have you sold refined oil in past years? A. I have sold refined oil and practically specialized in the distribution of refined oil and gasoline for the last twenty years.

Q. Do you sell it in quantity or in barrels to the last consumer? A. If you are speaking about refined

94 *George F. Fox, Cross*

oil, there is very little refined oil sold to anybody in barrels, for United States consumption.

Q. What is it sold in? A. Refined oil today is sold out of tank wagons, and it is sold in tank cars, and in some sections it is distributed in the gallon cans from house to house.

Q. Is it not sold in what you call drums? A. Not except in such sections of the country where there is no general tank wagon distribution. Refined oil you are speaking about now?

Q. Yes. A. The amount of refined oil that is sold
95 in the United States, east of the Mississippi River, except the southern states and any other sections where the roads are bad, is very small, except that distributed by tank wagon.

Q. Don't you know that in the old days when you used wooden barrels, that a great deal of oil was sold in barrels? A. Oh, yes.

Q. To grocery stores? A. But not after a tank station was established from which a delivery service could be arranged for.

Q. Don't you know that a great deal of oil is delivered yet in steel drums? A. Not where it can be delivered by tank wagon.

96 Q. Where some better method is used it is not; but it is sold in that way, is it not? A. The only way that anybody today buys refined oil for resale, other than out of a tank wagon—and by a tank wagon I mean a motor truck also—is in such cases where the roads are bad or where the towns may be beyond the delivery radius distance, and these are very, very few.

Q. Don't you know that it is sold here in New York, to the City of New York, in steel drums? A. When you speak about New York in steel drums, New York City is the only place that there is no general tank wagon delivery service in the strict sense of the word.

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Q. Don't you know that different kinds of oil that need to be kept in some container of that kind, like a steel drum, are sold and with the understanding that they will get credit for the drum when they return it? A. In some places that is done, and in other places it is sold with the understanding that you charge the man for the drum.

Q. In some places it is sold, and it is quite a common practice where the drum remains the property of the seller to be returned to him, is it not? A. Yes, sir.

98

Q. And it is necessary to sell it in some such container as that, if you are selling it by the barrel, is it not? A. Yes, sir; but, unless, as I have outlined above, there is some reason why you cannot reach the man with your delivery service, he is not going to buy very much.

Q. I do not care about the reasons for these things. I want the facts, now. Sometimes it is sold in that way, and the drum remains the property of the seller, to be returned to him; that is a fact, is it not? A. Yes.

Q. That is an old practice, is it not? A. Yes.

Q. And in some cases they bill the drum to the purchasers, but give them credit when they return it? 99
A. Yes.

Q. That amounts to the same thing, does it not? A. Yes.

Q. Because there is always credit enough to cover the value of the drum? A. Yes.

Q. Is not that a common practice in a great many instances that require a special container for the product? A. I cannot say.

Q. That the dealer furnishes the container? A. I cannot tell you.

Q. Don't you know that the milk dealers do that very thing—furnish the bottles that it is kept in until used? A. I thought you were speaking particularly about the steel drums.

100 Q. I have left that, now. A. What was the question?

(The question was repeated by the reporter.)

The Witness: Yes.

Q. And they have their name or their trade-mark blown in the bottle or printed on the stopper so that the consumer may know what grade of milk he is getting? A. Yes, sir.

Q. Don't you think that is a pretty good practice, for the public to be able to know what they are get-
101 ting?

Mr. Zechiel: I wish to object to that question. It is not specific that you mean the whole practice, or the milk bottle practice.

By Mr. Speer:

Q. I will ask him, first, about the milk bottle, and then I will ask him about the other. A. In the case of milk I should say it might be all right.

Q. Does not the public always want to know whose product they are getting, especially if it is a product where there are different grades? A. I do not think that applies to gasoline.

102 Q. I am not asking you about that. We will leave the gasoline for the moment. A. You are asking me about oil products.

Q. You know you go into a drug store and many of the products that you buy are put up in a package with the name of the maker on it, so that the public will know whose make they are getting. That is a fact, is it not? A. With some products, yes, sir.

Q. There is a difference in the grades of gasoli is there not? A. Yes, sir.

Q. And the public is interested in knowing that they are getting a good grade of gasoline? A. Yes; but

the man that buys it is more interested than the public —I mean the garage man.

Q. Why is he more interested? A. He has got his future business to look after.

Q. That is, the reason he is interested is that if he is selling this to the public, he wants a good grade to sell to them, or he will lose his trade? A. Yes.

Q. The public are just as much interested, however, in knowing they are getting a good grade, are they not? A. Yes.

Q. They are the people who are using it? A. Yes.

Q. These different companies that are in the business make certain grades of gasoline, and nearly all of them now have their trade-marks as indicating their grade and make of gasoline, have they not? A. Don't get grade confused with brand. As to brands, yes. Grades is a much wider proposition. 104

Q. Well, their brand is supposed to indicate that they are selling a certain grade, we will say, called by their names; that is a fact, is it not? A. I cannot say so.

Q. We will say a certain quality, then. Will that suit you better? A. I cannot say so.

Q. What are they putting a name on for? What does it mean, then? A. Because they wish to sell their product under a brand. 105

Q. What is the purpose of having a brand on it, if it does not indicate something? A. The purpose, in the case of gasoline, is to indicate more particularly the source of the gasoline; the source of supply of the gasoline.

Q. And it does make a difference in gasoline—the source from which it comes, does it not? A. Not necessarily so.

Q. Do not some people claim that gasoline made from some certain oil is better, and will produce more power than gasoline made from other oils? A. Do you mean the consumer, now?

106 *George F. Fox, Cross*

Q. I am speaking of the seller. A. Oh, yes.

Q. They all have a brand, and many of them a registered trade-mark under which they sell their gasoline? A. Yes.

Q. And they claim that the gasoline so made and sold, under this brand, is specially adapted for use in automobiles, do they not? A. I cannot sit here and say what everybody claims for their products.

Q. You know that some of them do that? A. I know that we claim that.

Q. Don't you know that the others advertise their
107 brands and say: "This is specially adapted for automobiles"? A. There are not so very many others that advertise their gasoline.

Q. They do not? A. No.

Q. Don't you see these names over the filling stations? A. Well, now, when you are talking about advertising, I do not mean particularly over the filling stations.

Q. What do you mean by advertising? A. Advertising means general publicity.

Q. Yes. Does not that give it publicity? A. It gives it filling station publicity so far as the brand is concerned.

108 Q. If you put it in the newspaper and advertise it under that brand, that gives it publicity, too, does it not? A. Yes.

Q. All these things give the name publicity? A. Yes.

Q. And the purpose in that is to persuade the public that this is a good brand of gasoline, which will be good for them to buy, is it not? A. Yes, sir.

Q. There is nothing unfair, is there, in that practice—for a man to develop a brand of goods and endeavor to get it to the public under that brand? A. No, sir; so far as he develops it through his own channels; but when he is going to take the garage man,

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who has been buying gasoline from some other company that has been absolutely satisfactory, and who has no complaints on that gasoline, and he is going to him, and going to give him this tank free, it does make some difference.

Q. How is competition going to develop; how is a man going to get his share of the business, if he does not in some way bring it to the public and create a demand for it? A. The garage man who got these tanks free did not worry much about that, because he did not come to any oil company and ask for the tank; the oil company was the one worrying about that 110 proposition.

Q. You don't know that yourself? You are only giving your conclusion? A. I think I know about it myself, so far as the general proposition is concerned, in the sense that the statements I am making are the result of the information that I would get from our field force.

Q. Did you never lose any customer where a tank was not loaned to him? A. Yes; but we don't lose them like we do when you loan them the tanks free.

Q. Your judgment, when this practice came in, was that it would not be profitable for you to engage in this filling station business, and you have not done so, 111 either by putting up stations of your own, or by furnishing tanks and pumps to other people? A. As I stated before about this profitableness, we figured that it would not be profitable; that we could use that money to better advantage; and, further, our business over a period of years would be a more substantial business, if we did not adopt that policy.

Q. Yes. A. And that we would be in better shape to retain such of the gallonage that did stick with us by following the proposition that we believed that there were enough garage men in the United States

112 *George F. Fox, Cross*

who figured that they were going to run their business as they saw fit.

Q. But it has turned out differently, that this system has caused a great many filling stations to be put in in every community, has it not? A. What has turned out differently?

Q. As a result of the use of these pumps and these filling stations, a great many of them have been put in, now, in every community, have they not? A. I will say that a great many pumps have been put in, yes.

113 Q. I am speaking of the whole equipment—including the tank that goes with the pump. Of course, there has to be a tank with the pump, has there not? A. Yes.

Q. When you are doing business with a garage, is it your practice to make a contract for a certain period? A. With the exception of some four or five years ago, when the practice was started by, more particularly, the Standard Oil Company, in the section where we did business, there have been no contracts made with garages for the supplying of their gasoline, either as to quantity or as to price, that, as a general policy is being pursued today by all of them.

114 Q. I am not talking about general policy. I am talking about what you do. Have you not made contracts to sell to certain garages, all their gasoline for a certain period? A. Not within the last three or four years.

Q. Do you consider that an improper practice? A. I certainly do.

Q. Do you mean to say that you have not a right when you want to work up your business, to know how much you are going to sell during the year, and to get a contract from a man as to how much you will furnish him? A. There is a difference between right and good business.

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Mr. Zechiel: I am going to object to that question as immaterial and irrelevant to the issues of this case.

Mr. Speer: I want to get an idea about the gentleman's construction of unfair practices.

Examiner McCorkle: I think the witness may answer the question.

(The question was repeated by the reporter as above recorded.)

The Witness: Do you mean legal or otherwise? You say whether we have a right to do it. Whose right?

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By Mr. Speer:

Q. Don't you think it is a fair practice? A. I do not, for the reason that the making of that contract in such a case must carry with it two important things: quantity and price; and as the average oil marketer has no idea what the price of gasoline may be over a certain period, if it is right, it is certainly poor business judgment on his part to make such contracts.

Q. Then the reason you did not make contracts for a time is that you were afraid the price of gasoline might change, and that it might prove to be an unprofitable arrangement? That is the only objection you have, is it not? A. That would be the objection to it. I would say, if I could put a statement in there, that it is not considered very good practice by anybody, because there are no gasoline contracts covering the sale of gasoline as to either quantity or price, except where they are tied in with these filling stations or tank propositions.

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Q. Do you mean to say gasoline is not being sold in this country every day by the quantity where a large marketer of gasoline agrees to furnish to the purchaser a certain quantity covering what he will need for, say, a year? A. And at a price?

118 *George F. Fox, Cross*

Q. Well, at a price, with a shifting price. A. I will say to the best of my knowledge; and I will say here that I think I have a right to say that I know something about it, and that there are no gasoline contracts of that kind that you mention in effect anywhere in the territory that I have outlined here, unless it is in connection with a tank or pump proposition; further, that that policy is absolutely foreign to the general practice in the oil business.

Q. What do you mean, Mr. Fox, by the expression that you used about going into a territory and developing business there? A. Going in and developing your own business, trying to get an increase in our gallonage.

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Q. In order to do that you have to create a demand for it from the public, do you not? A. The demand is already there.

Q. There is no demand for your product until it is brought in, is there? A. No; but the demand for gasoline is there.

Q. Is it not the purpose of the companies in having a brand and using it and selling it under that brand, to create a demand for their particular product by maintaining its uniform quality so that the public will be satisfied with it? A. Yes, sir.

120

Q. When a company has done that and has sold a good quality of gasoline, maintained its uniformity and created a reputation for it, it is certainly a good business practice, is it not, for them to endeavor to have their product furnished to the public under that brand? If they are not permitted to do that, what is the use in their trying to develop a reputation for their brand? What do you say as to that? A. Yes.

Q. The modern method of selling gasoline to the ultimate consumer in small quantities is through these tanks and pumping outfits, is it not? A. Yes, sir.

121

Q. And by doing so, and by having the sign upon the pump, the public are shown what brand of gasoline they are purchasing. That is the way it is done, is it not? A. Yes, sir; that is, in some cases. I would say that, taking the country over, the brand is not shown on fully as many pumps as those upon which it is shown.

Q. You think there are as many pumps that have not any brand on them as there are with the brand on them? A. Yes.

Q. In that case the dealer is not holding himself out as selling any particular brand; he sells any brand he wants to, does he not? A. He figures that he is running his own business.

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Q. Yes; and the public have to depend on him as to whether they are getting a good brand of gasoline. A. They do not have to depend on him as to whether they are getting a good brand of gasoline because if they are not getting the gasoline, there is usually some other place that they can get it.

Q. Yes; and a man driving along the road and wanting to get gasoline and not knowing this garage man has to depend upon his reliability as to whether he is getting a good grade of gasoline, does he not? A. I don't think the average automobilist—

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Q. Now, answer my question first, and then explain it if you care to.

(The question was repeated by the reporter as above recorded.)

Q. If there is no sign up. A. Yes. I would like to add to that: Yes, but the lack of a sign does not necessarily mean that the man is going to sell poor gasoline.

Q. If you are going to have two different brands of gasoline, sold to the public as such, it is necessary, is it not, for you to have separate tanks and separate

pumps? A. But who is going to have these two separate tanks and separate pumps?

Q. I am asking you if that is not necessary. A. I do not understand your question.

Q. If you are selling two brands to the public at the same time, is it not necessary to have separate tanks and pumps for that purpose? A. Who is going to sell this to the public?

Q. Anybody. A. Do you mean the garage man—is it necessary for the garage man, in order to handle two grades of gasoline, to have two separate tanks?

125 Q. If he is going to sell them as different grades? A. Sure.

Q. Under the sign he has to have a separate tank and pump for each one, has he not? A. Sure.

Q. And there is no other way by which the product, the gasoline under a brand, can be delivered to the ultimate consumer except by having a tank and a pump for that particular brand, is there? A. No, sir.

Q. Would it not be a violation of the laws of nearly every state for a man to have a sign over his pump of a certain brand of gasoline and to sell another brand through it?

Mr. Zechiel: I object to that.

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The Witness: I don't know.

Mr. Speer: I withdraw that question.

By Mr. Speer:

Q. Instead of loaning the tank and pump to the operator of the filling station, would it not be possible for companies to create an agency there, and make the dealer their agent? A. I suppose so.

Q. And sell their gasoline through their own pump and equipment? A. Yes, sir.

Q. Is not that done in a great many places? A. Yes, sir.

Q. That has just the same effect, so far as your business is concerned, as the other method, does it not? A. No, sir. 127

Q. Why not? A. In one way you absolutely come in and take away a customer that we have, and the other way you are starting a new customer of your own.

Q. Of your own? A. Yes.

Q. Could they not go into a garage that was selling your gasoline and make arrangements with the owner to act as their agent and sell their gasoline? A. If he kept on selling ours, and he would also put in the other fellow's, we would have no kick coming. 128

Q. I am not speaking now, about whether he will continue to sell yours. I don't care anything about that. But is it not possible for a marketing company to go to a garage where you are selling gasoline and arrange with the garage man to be their agent and sell their gasoline through their pump? A. Yes

Q. And is it not done? A. Yes, sir.

Q. That has the same effect, so far as creating competition, and probably causing you to lose some trade is concerned, as if they loaned him a pump, has it not? A. If it is an exclusive arrangement for the other fellow's gasoline, yes; but that is not what is done. 129

Q. It might be that in neither case was there an exclusive arrangement, and the effect would be the same, would it not? A. No, if there is no exclusive arrangement the competition would be fair.

Q. Then if, in loaning the tank and pump, an exclusive arrangement was not made, that is perfectly fair, is it not? A. Except that, naturally, if that tank or pump were put in there at a rental of little or nothing, the average garage man would be foolish not to take the same in.

Q. And if he had business enough to justify [illegible]

130 *George F. Fox, Cross*

would sell that brand of gasoline to his customers, so long as it was satisfactory, would he not? A. Yes, sir.

Q. He could be made an agent, and that would not necessarily prevent his selling somebody else's gasoline if he wanted to, would it? A. But they are not made that way.

Q. The truth is that very few garage men have sufficient business to justify the operation of more than one pump; is not that a fact? A. I do not think the people that furnish all these tanks free thought
131 so, or they would have let him alone.

Q. You are not answering my question.

(The question was repeated by the reporter as above recorded.)

A. I say no.

Q. Then they have enough business to justify their keeping more than one pump? A. What was that previous question?

(The question was again repeated by the reporter as above recorded.)

A. The average garage man only needs one pump.

132 Q. And even if he owns his own pump, he usually is selling some particular brand of gasoline, is he not? A. If he owns his own pump, quality and service, in the long run, will secure the business.

Q. You are not answering my question. If he owns his own pump, he usually only sells one brand of gasoline at a time? A. That question could not be answered yes or no, because you take the country over and the man with the one pump will buy a great deal of his gasoline, for instance, from one concern and may buy part of it from another, and the question of quality and service in the long run will say who is going to get the major part of his business.

Q. That will induce him, in the end, to buy from

some particular company with whose gasoline he is satisfied and that gives his customers satisfaction? A. Yes, sir.

Q. So that it simmers down, in the end, that the man with the one pump is only handling one brand of gasoline, does it not? A. I could not say that it does.

Q. Would he not be a very foolish man to be buying two or three brands and mixing them? He would not know who was to blame if his customers were dissatisfied? A. He is looking out for his own business and, in the long run, the garage man cannot afford to handle anybody's gasoline unless it is all right; and 134
if it is all right, he would just as soon take it one time from one individual and then another time from another.

Q. He is not likely to keep experimenting in that way? If he has a brand that suits his customers, he is likely to keep buying it, is he not? A. Yes.

Q. So that even when he owns his own pump he is usually handling but one brand of gasoline? A. You have asked me that same question now, half a dozen different times.

Mr Zechiel: I believe he has, too. I think it has been answered a number of times, quite 135
sufficiently for the record; and I object.

Mr. Speer: He has shown an unwillingness, it seems to me, to answer.

Mr. Zechiel: I think the question is a little indefinite.

(The question was repeated by the reporter as above recorded.)

By Mr. Speer:

Q. I will add to that: That even when he owns his own pump the garage man is only selling as a rule, one brand of gasoline at a time, and continues to sell it as long as it gives satisfaction. A. I cannot say that

he does, for this reason: That if the man owns his own tank, if he has been buying the major part of his supplies from any one company, if he has an abnormal demand, and if the wagon of another company comes along, he will have no hesitancy, about buying gasoline from the other company, provided he knows that it is good gasoline, and putting it in that tank. Therefore, any distributor may have a customer who has been buying practically exclusively from him, and his account, for instance, might become such that that distributor would not supply any more mer-
137 chandise, and the garage man, in that case, would not hesitate—in fact, he would have to put in the gasoline of some other company.

Further, as very frequently happens, all oil companies run out of gasoline, sometimes not only for days but for a period of days; and during such times the garage man does not hesitate, and as a matter of fact self-preservation requires him to buy what other grade of gasoline he can get; and during such times he certainly does not take down the sign, if he has one, on his pump, of the grade of gasoline that he might have been more particularly specializing in.

Q. And he continues, you think, to sell this new
138 kind that he buys under the old brand to the public? A. Yes; and further, the chances are that if, for any reason, he should feel that the company was in any way at fault in not having kept him supplied with his regular grade of gasoline, the company that then helps him out has a very good chance for his future business.

Q. Has not this loaning of pumps resulted, in every community, in additional competition, more companies engaging in business than formerly? A. I will say it has resulted in more garages selling gasoline when they got the pumps for nothing, yes.

Q. A great many of them, if the pump was not furnished them, would not handle it at all, would they?

A. Practically all garages, of course, handle gasoline, but the furnishing of the free pumps has resulted in a great many more filling stations.

Q. Yes; and also a great many little garages that probably would not handle gasoline have these little filling stations in them? That is a fact, is it not? A. I would say yes.

Q. So that, in that respect, it accommodates the public more by having more filling stations at which they can have their wants supplied? A. I would say yes.

Q. Is it not a fact that in North Carolina, and some 140
other parts of your territory that you have had more demand for gasoline during the last year, or probably two years, than you could supply, and that you have been actually compelled to go to your competitors to get from them the gasoline with which to supply your trade? A. When you speak about North Carolina you are bringing up a condition that does not apply to some of the other states. Will you not mention some one of the other states?

Q. Let us settle North Carolina first. Answer the question as to that. A. May I have the question repeated?

(The question was repeated by the reporter 141
as above recorded.)

A. In North Carolina, there is a special grade of gasoline required, and I cannot say that our demands there have exceeded our supply to the extent where we had to buy any more gasoline outside than we would have otherwise contemplated, but I would like to ask that some other state be mentioned, where the regular grade of gasoline is sold, as the conditions in North Carolina are quite different from those in other states.

Q. Do I understand that the public there requires

some special kind of gasoline? A. Not the public, but the state laws are such that you have got to put in a special grade of gasoline.

Q. The Texas Company is a competitor of yours there, is it not? A. Yes.

Q. And has not your company had to go to the Texas Company to get gasoline from them? A. Not in the last two years.

Q. How long ago was it that it happened? A. During one year, when we could buy it from them to better advantage than we could from anybody else,
143 due to, perhaps, the fact that the tank car situation, among other things, was abnormal, and that they had a near shipping terminal, and we had the necessary tank cars to nicely handle the proposition.

Mr. Hayes: May I ask a question right there?

Mr. Speer: Certainly.

By Mr. Hayes:

Q. I may have misunderstood one answer that you made some time back, Mr. Fox. In speaking of the installation of the pumps in the garages, you spoke of an exclusive arrangement. What did you mean by
144 that? A. Practically all these pumps are put in under an absolute written or implied agreement that the party who puts them in is to have the exclusive sale to the garage man of the gasoline that goes into those pumps.

Mr. Hayes: That is all I wanted to know.

By Mr. Speer:

Q. I understand that many of these contracts which are now under investigation are not to that effect, but simply that the pump loaned is not to be used to sell the gasoline of any other company than that of the company which loans the pumps? A. That means the same thing, exactly.

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Q. But that there is no restriction upon the loaning of the pump to prevent the garage man buying other gasoline, if he wishes, as long as he does not sell it through this pump. A. If he puts in another pump?

Q. Well, he could sell it by the barrel. A. I do not want to pass on that. The agreements as made by the various oil marketing companies will speak for themselves.

Mr. Zechiel: They are on record.

RE-DIRECT EXAMINATION by Mr. Zechiel:

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Q. Mr. Fox, if you know, if you have information of this sort, about what per cent of the various retailers of gasoline own their own equipments? A. That would be a guess, but I would say up to five or six years ago they practically all owned their own.

Q. And now? A. I would say in the bigger cities—understand this would be a guess, I have no statistics—

Q. I understand. A. But I would say in the larger cities not over twenty-five to forty per cent own their equipment.

Q. And in the more rural territories? A. The furnishing of tanks free is not done so much in the rural territories.

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Q. Just answer the question as nearly as you can. A. "Rural" is pretty broad.

Q. Let us get back to a middle section and say in cities of ten or fifteen or twenty-five thousand. A. I would consider them in connection with your cities proposition.

Q. Let us get down to the town of three hundred or four hundred and up to a thousand; not above a thousand, or around about probably two thousand—if that seems to be the line that we ought to draw. A. I would say that three-fourths of the equipment is

owned by the garage man in the small outlying towns.

Q. If you know, who, of those in those small outlying towns are—if there is any difference—are likely to own their own equipment; and what parties, described in any way in which you can describe them, are likely to have leased or loaned equipment? A. I don't see where you could make any distinction. The man in the smaller town that sells gasoline is just the same as the man in the bigger towns.

Q. I am not contrasting the large and small towns; but say there are two dealers or three dealers in a small
149 place, and one has a leased equipment, and the other two, say, own their own? A. I would not want to say—

Q. If you don't know, just say so. A. I would not want to get down to detail like that.

Q. That is sufficient. What do you say about the changeability of customers, where customers own their own equipment, as compared with those who are under lease and loan contracts such as have been described and are under consideration? A. Where a customer owns his own equipment, if you give him quality and service, you can figure that his business practically is yours, year in and year out. Of course,
150 where he has got an outfit that somebody may have loaned him, your chances of getting that business, so long as the arrangement is in effect, covering the loaning of that tank—the chances are very slim, except as to the getting of the "pumps"—in cases where the party who might have supplied the pumps might be out of gasoline, or in the event, of course, of something coming up in connection with his account, or if he had complaint on the gasoline of that brand.

Q. Going back again to this previous question concerning the number of people who own their own equipment in certain areas: Does your answer apply generally throughout your whole competitive territory? A. I would say so.

Q. Do retailers of gasoline in your territory sell more than one kind of gasoline during the same interval, generally? Take the case of John Jones, for example, a garage man; on the average, is he buying and selling during the same period—one week or two weeks—gasoline of more than one oil company? A. I would say, in answer to that, that he would be selling the gasoline of one oil company.

Q. What is your experience along the same line in the garage and retail business generally? Do garages have more than one oil tank and pump through which they dispense their gasoline? A. I cannot get down to 152
a lot of detail on that.

Q. If you don't know, just say so. I am only trying to get at the fact. A. I would rather not answer that.

Q. Are there few or many agency contracts compared with the number of retailers of gasoline? Agency contracts were spoken of in your cross-examination. A. I would prefer not to make any answer as to whether they are few or many; the reason being that, having practically decided that we would not market that way, as the propositions came up, where it meant giving a man a tank or losing his busines, we immediately faced the proposition and lost his business. 153

Q. In answer to Mr. Speer, on cross-examination, you said that the effect of the lease and loan practice has been to accommodate the public because of the wider distribution of the places of retail of gasoline. I am correct about that? A. Yes, sir; but what I hesitated about that for was that I do not think that is necessary. The average man with an automobile does not wait until he is down to the last drop, and there would have been plenty and sufficient sources of supply for the average automobilist without all these pumps that were put in because people could get them for little or nothing.

154 *George F. Fox, Re-direct*

Q. As a matter of fact, the rural distribution of gasoline and oil tanks and pumps for the accommodation of the public, as compared with the city distribution of those facilities is far less, is it not? A. I would say so.

Q. And it has not been your experience in the smaller towns that there is a lack of distributing centers of gasoline to accommodate the public? A. No, sir.

Q. You testified also, on cross-examination, that in certain areas your business has been curtailed. What
155 did you mean by that? A. I meant that naturally wherever we had customers who had bought from us, and they usually were the larger ones, when they were approached by some competitor with the tank proposition, if we would not loan them the tanks—and we would not—I meant the direct loss of that gallonage.

Q. In that respect, have you lost approximately all your business within any particular area, because of that preference, or has that been scattered? A. We could pick out some few centers where we could say that we practically do not today sell a single garage man, where we did, at one time, have a nice business.

Q. Was the decrease in your business there due to
156 this practice? A. Oh, absolutely. I want to say right here, in speaking about volume of business, my statement that our business had increased, I do not mean that it had necessarily increased in the places where this practice has been followed, but I mean that our total business had increased, despite this policy, which meant that when you lose it in one place, you have got to get it in another.

Q. Speaking with respect to the North Carolina situation, how does that differ from the ordinary situation? A. You mean as to the quality of the gasoline?

Q. No; the competitive effect of this practice. A. I know of one town in North Carolina where, when

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we went in there, I would say ten years ago, we secured a fair volume of business, which has gradually dwindled down to where I think we, today, have practically nothing in the way of business with the garage men.

Q. Do you know why? A. On account of the giving of these tanks.

Q. You are also engaged in the sale of lubricants? A. Yes, sir.

Q. Does the leasing and loaning of oil tanks and pumps through which certain portions of a retailer's gasoline business is tied to a particular oil company 158
affect, in any way, the sale of your lubricants and other supplies at that particular garage? A. There again, I think the contracts that have been made—and you surely must have some of them—will cover that proposition; because in some of them my opinion is that the matter of lubricating oil is covered.

Q. Disregarding any question as to whether or not the contract might cover that proposition, I am asking you only for the fact as you have experienced it, as to whether or not it does have an effect upon it. A. In a good many places it is made a condition that the customer must buy his lubricating oil from the concern that has furnished him the tanks. 159

Q. Even granting that it might be a condition of the contract, still I can see how somebody might violate the contract; so I am asking only for the fact—whether there was such a condition in the contract or whether there was not. I am asking whether or not the effect of these lease and loan contracts about which you have testified here all morning—whether or not that has had an effect on your sale of general lubricants to the garage under such contract? A. I would like to answer in this way: It certainly has an effect on the sale. I do not want to say, again, about our own particular business.

160 *George F. Fox, Re-cross*

Q. What is the effect? What is the general result? A. It would have the effect of lessening the opportunity of anybody else selling lubricating oil in there.

Mr. Zechiel: That is all.

RE-CROSS EXAMINATION by Mr. Speer:

Q. I presume it is just about the same as if you, without any contract, or without loaning the pump, by giving the man good gasoline had gotten him to take
161 from you; I suppose that it would give you a little advantage in selling him lubricating oils? A. Yes; but you have a big advantage when you come in there and make the fellow buy your gasoline.

Q. He does not have to. He can take that pump out any time, can he not, under the contracts? A. He can; but he does not.

Q. And somebody else is always ready to put one in, if he is dissatisfied? A. Well, they don't take them out.

Q. That must be because they are satisfied with the grade of gasoline that is being furnished to them. A. No; my own candid opinion is, after they are in there, they are afraid to take them out.

162 Q. Is it not a fact that a company selling its gasoline that way to the public under a brand is not going to sell poor gasoline, or it will injure its reputation? A. I don't know. I would say if they had their own facilities in there, and had the business absolutely tied up, they would be more likely to sell inferior gasoline than they would if they had to take their chance on getting business.

Q. In these places where you say you have lost business, as a matter of fact, there are more companies doing business there now than there were before? Other people are doing business instead of you? A. I do not say so.

Q. Well, there is competition? A. Yes; but competition does not necessarily mean—if you get new competition it does not necessarily mean that he is going to take your trade. Let him take the other fellow's.

Q. But in these particular cases they took your trade? A. Yes; but they never took it unless they bought it, by giving them these tanks.

Q. What I want to get at is that there are other companies there competing just the same. A. Yes, but competition is the life of trade. Where there is competition, there is busniess. 164

Q. Surely. A. Where there is business, if you go after it right, you can get it.

Q. Where these little filling stations are established, so many of them in different towns and by different companies, does not that give the consumer the right to choose which brand of gasoline he wants? A. These pumps are not put in with the idea of helping the consumer; the pumps have been put in with the idea of selling the gasoline.

Q. Certainly. The man who puts them in and who is selling under a brand, is trying to get his gasoline to the public, is he not? A. Yes, sir.

Q. And he wants to establish a reputation for it, 165
and to have a permanent business, does he not? A. Yes.

Q. And that is what you are trying to do with your methods—to have a permanent business? A. Yes.

Q. Nobody wants to go out and spend money and develop a community unless he is going to satisfy the people and get his product sold? A. You are all right on your proposition; but you are bringing in the consumers part. You are wrong about what the consumer is thinking about these filling stations.

Q. He is not objecting to them, is he? A. I have never seen anybody send a petition in to our office:

Please have John Smith put a filling station in somewhere. I cannot get gasoline of the kind I want. There are not enough garages here to sell it.

Q. It looks as if the oil men were doing business without being requested—they are pushing it themselves? A. You have got to push it, I say.

By Mr. Hayes:

Q. Does the character of the gas the garage man carries, Mr. Fox, depend greatly upon the demand of his customers? A. Well, we will put it this way—

167 Q. Just put it my way if you can. A. What was the question?

(The question was repeated by the reporter.)

A. No, sir; the garage man sells the grade of gasoline that he can usually be prevailed upon by the oil company that may be successful in getting his business to buy.

Mr. Burdeau: I got the impression from your answer that you meant the ultimate consumer was not particular as to the brand of gasoline he got, if it was good.

The Witness: I would not just say that. I would

168 say the garage man does not know so much about what the consumer wants. He is going to sell what gasoline he has bought.

By Mr. Nesbitt:

Q. I understood you to say, a while ago that there was some locality in North Carolina where, because of this practice of leasing the pumps and tanks at a nominal rental, you were required to withdraw, practically; that the business was practically nil there; was that true? A. Yes.

Q. I want to ask you the question again: Is it not true that during the last two years in the State of

North Carolina the requirements of your trade have made a greater demand upon you for gasoline than you were able to supply? A. I tried to answer that question before. I am not here to disclose any of our own family affairs. We buy gasoline that goes into North Carolina, and we buy gasoline that goes into practically every state in which we operate, and there has never been a time when we could not have supplied all the gasoline that we could have sold through our channels in North Carolina.

Q. You had a market for every drop of gasoline that you could supply in that state? A. No; I will not 170
put it that way. I say we could have supplied all that might have been demanded. In other words, we could have taken care of a much larger volume of business than we did.

Q. Had you had the gasoline? A. No. We could have gotten the gasoline, had we had the business.

Q. I will put that question to you again: Is it not true that during the last two years, in the State of North Carolina, your trade has made a greater demand on you for gasoline than you were able to supply, of your own? A. Get out of our own; because I start out with the proposition that we buy, the Indian Refining Company buy gasoline. We could have 171
bought additional gasoline for North Carolina, just the same as we could have in any other state.

Q. Have you not bought additional gasoline in North Carolina from your competitors, and sold it in North Carolina during the last two years? A. What do you mean by "competitors"?

Q. People who were marketing, the same as you are. A. A lot of marketers are not competitors. Today we get all the gasoline we want for shipment into North Carolina. We buy it, and we do not buy it from a competitor. There are a lot of refiners in the business that are not competitors.

172 *H. E. Mills, Direct*

Q. That was the very point I was asking you about. Is it not true that in North Carolina in the last two years you have bought from your competitors to supply your trade? A. To get down to the competitive part, I think the competitor came to us to buy his gasoline three years ago. We did not go to him.

Q. Did you buy it from him? A. Yes; about three years ago.

Examiner McCorkle: Is there anything further?

173 Mr. Nesbitt: That is all.

(Witness excused.)

Whereupon, at 1:10 o'clock, P. M., a recess was taken until 2:15 P. M.

After recess.

H. E. MILLS was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

174 Q. State your name and address, please. A. H. E. Mills, Syracuse, New York.

Q. With what concern are you affiliated? A. C. E. Mills Company, Syracuse and Johnstown, New York.

Q. What is your position? A. I am president.

Q. How long have you been associated with that company? A. Twenty-four years.

Q. Did you have any oil experience prior to that time? A. No.

Q. During that time of twenty-four years, what has been your position with the company, or positions, if you had several. A. Bookkeeper, salesman, purchasing agent—everything down the line to chairman of the Board.

Q. At the present time what is the general territorial extent over which your company does business? A. Albany, Rochester, north and south to the state line of New York State, not including Rochester; we do not go into Rochester.

Q. Not including Rochester? A. No.

Q. About how much of New York does that cover? A. Better than half.

Q. Generally the central portion of New York, the central half of New York? A. Yes.

Q. Who are your competitors? A. At every particular point, or throughout the territory? 176

Q. Generally throughout the territory. A. We have the Standard Oil Company of New York, the Indian Refining Company, the Crown Oil Company of Syracuse, William H. Hall, the Onondaga Oil Company; there are one or two others that carry lubricating oil in carload lots, that do not enter into this proposition.

Q. I did not ask you what your general line of business is. A. We handle all kinds of petroleum products; also animal, fish and vegetable oils.

Q. In connection with your business do you handle what is commonly known as the curbstone pump? A. Yes, sir.

Q. Do you buy and sell the curbstone pump and the 177 outfit, generally, to your customers? A. We have, but that is the exception.

Q. Do you in connection with your business, lease or loan such equipments to your customers? A. I am sorry to say that we do.

Q. Is that true throughout your whole competitive area? A. No; some of the companies do not.

Q. I mean, with respect to your business. You lease and loan throughout your whole area generally? A. No; only within a radius of twenty miles of Syracuse and within a radius of about twenty miles of Johnstown.

178 *H. E. Mills, Direct*

Q. What is your practice in that respect—a leasing proposition, or loaning, or a condititon of sale, or what? A. Our proposition is to sell the man the outfit, if possible, at cost or plus a small charge for carrying, say five or ten per cent.

Q. In case you cannot sell, then what is the practice? A. Then we install them on a dollar a year rental basis.

Q. And in those cases you retain title to the equipment, I suppose, do you? A. We do.

Q. In a general way, of the pumps that you handle,
179 that you place with customers, what per cent of them to you lease or loan? I take it that it is all a lease proposition. What per cent of them do you lease and what per cent, approximately, do you sell outright? A. Probably ten per cent straight sales, and ninety per cent leased.

Q. You say you do not lease throughout all your territory but confine the leasing to certain localities? A. Yes, short hauls that we can reach by tank wagons.

Q. What is your reason, if you have any, for not leasing in the entire area? A. We do not have the proper terminal facilities to serve the outside areas. We would have to have more stations, more tank car
180 storage.

Q. If I may ask, just how do you conduct your business in other places than those where you do this leasing busines, with oil tanks and pumps? A. The other proposition is lubricating oil.

Q. Then it is a fact that you do lease and loan oil tanks and pumps wherever you sell gasoline? A. Yes, sir.

Q. How long have you been engaged in the practice of leasing and loaning oil tanks? A. Less than five years.

Q. Had you sold such equipments prior to that time? A. We had; and since.

Q. What was the occasion of entering on the business practice of leasing and loaning oil tanks and pumps? A. There was simply a competitive condition created that we were compelled to meet.

Q. Will you go into that in more detail and describe the whole situation—what you did. A. Our customers came to us and stated that other companies wanted to install pumps and tanks for them. They had been customers of ours, with a small outfit, and they wanted more storage, as the motor car production increased, and they did not feel obligated to go to that expense themselves when they could get them for one dollar a 182
year rental; so there were so many of those propositions put up to us that, after a time, we had to get into it ourselves. We turned it down for a year or a year and a half. Eventually we came to it.

Q. Prior to the time that you entered on the practice of leasing and loaning your equipments, had you lost any customers because of refusal to lease and loan for a nominal consideration? A. That is a hard fact to determine. I would say yes.

Q. Would you say that you had lost a few or many such customers? A. Maybe fifteen or twenty per cent of our customers.

Q. What is your experience in your territorial area 183
generally as to the number of oil tanks and pumps that are installed under leasing contracts, and those that are installed under direct sale, outright sale? A. I reckon that seventy-five to eighty-five of the pumps are on a leased basis.

Q. Does that same per cent hold true of all your territory quite the same in the congested areas, that is of the larger cities, as in the rural territory, or is there a generally different per cent of leased pumps? A. I think it is pretty much the same proposition.

Q. So that, in a small town of three hundred or four hundred, there is just as large a per cent of leased pumps as is in a town of forty thousand or fifty thou-

sand or one hundred thousand? A. More so in per cent in some towns where there is real keen competition.

Q. Do you find it in your experience to be true that where there is keener competition there are more leased pumps than in a territory where there is not such keen competition? A. Yes.

Q. In connection with your business do you have occasion to visit the individual retailer's establishments of your customers? A. Spasmodically; I do not make a practice of it.

185 Q. But you have been over the territory in that individual sort of way, coming in contact with the garages? A. Yes; we have men working continuously who are reporting to our sales manager, and I will get it through him as to the local conditions.

Q. In that respect, what is your experience with these retailers of gasoline; do they generally have installed more than one oil tank and pump equipment, or not? A. The large garages in Syracuse, for illustration, the largest one, has three, and the second largest one has two, and so on down to one for the smaller fellow.

Q. Then you would say that in the larger centers,
186 the larger distributing retailers frequently have more than one such equipment? A. They do in our town, yes. In Johnstown, New York, they do not.

Q. What is the fact about Johnstown? A. Johnstown is a one tank proposition. Of course that is a smaller town.

Q. You mean to say, by a one tank proposition, that a garage, or any other distributor, usually has but one pump and tank? A. That is it.

Q. And that uniformly the small retailers have just one equipment? A. That is the rule. There are some exceptions.

Q. Now, those larger garages at Syracuse, where

they have more than one tank and pump equipment, do they own those equipments, or are they a lease and loan proposition? A. Those two large propositions both own their own outfits.

Q. Do you know in any case where there are leased or loaned outfits where there is more than one in a single distributing center? A. Yes.

Q. Speaking with respect to those cases: Are they leased and loaned from more than one oil company, or from one oil company only? A. They are leased by two.

Q. Who are the companies in those cases? A. The 188
Standard Oil Company of New York and ourselves.

Q. Under what conditions did you place your pump with the company you are referring to? A. We first tried to sell it. We had the sale all consummated, we thought, and the other fellow came along and, to use a slang expression, I will say he "spilled the beans"; and then we had to put up the proposition of a dollar a year rent.

Q. I understand what the expression "spilled the beans" means generally, but not in this particular connection. Will you explain it? A. Well, he came along with his tank leasing proposition, at one dollar a year, and so the fellow put the proposition up to us: 189
"Here, I am not going to buy a tank of you, and pay you $300 or $500. I don't have to. We can lease a tank and pump, and have it installed free to us, for one dollar a year rental. If you want to put us in a tank and pump on the same proposition, all right, go ahead, and I will give you your choice of location." So we told him that we did not think we cared to do that; but afterwards we changed our minds.

Q. Afterwards? Was that after he had installed the Standard Oil pump or before? A. No, that was a week or two after we had first talked with him, the garage not having been completed.

190 *H. E. Mills, Direct*

Q. Do you know what was the occasion for your changing your mind? A. Conditions were such that we had to do it. That was all. I want to explain, somewhere in my testimony, about why we refused to put these in for so long—some views on that, wherever, you want me to put them in.

Q. Here is a good time to put it in now. If there was any reason why you refused, for a year and a half, to put in these equipments, and finally changed your mind, you may state it. A. Our idea was that the average filling station, or curb pump, if you please, or
191 outfit, does not put through to exceed thirty thousand or forty thousand gallons of gasoline per annum. It, therefore, would take four to five years, with the net profit we would make on the gasoline business, before we would have our investment back in the way of a profit; and we have always felt that it was a pretty far-fetched proposition, and that we should not have to really pay a man for the privilege of doing business with him. In other words, we were doing business on small capitalization, and we might go as far as we have, which was as far as we could go, and then have to quit; and the fellow with the big pocketbook could go on indefinitely.

192 Q. When you speak of the proposition, you mean go on indefinitely leasing oil tanks and pumps under these conditions? A. Sure. We figured the depreciation on them, and so forth, and at the end of five years they are going bad, and at the end of ten years they are rusted out; and in the meantime, you have continually the expense of upkeep of the pump, somebody running off with the hose on the back end of the car, and the matter of furnishing new hose, and the continual expense of upkeep; and it didn't look to us like we could afford to get into it very far.

Q. You say that was your opinion prior to the time that you started the business yourself. Have you

changed your mind about that in any particular, so far as the reasons are concerned, and business conditions? A. No. We still feel the same way, but we are game, we are in it and we go as far as we can.

Q. From your experience in that connection do you think that this practice of leasing and loaning oil tanks and pumps for a nominal consideration, under agreement or understanding with the lessee that he is not to use the pump for the purpose of sale of other gasoline than that of the party who leases him the pump, is a good business practice?

194

Mr. Speer: I wish to object to that as incompetent.

Mr. Zechiel: As far as I am concerned, the same general objections that were made this morning may apply.

Mr. Speer: All right.

Examiner McCorkle: Go ahead and answer.

The Witness: No.

By Mr. Zechiel:

Q. If, in your territory, your competitors were to cease this business practice, is it your opinion now that you could quit also? A. Yes. Decidedly so.

195

Q. That is all. A. I want to give you one more proposition here. I don't know whether you want it or not. If not, do not take it. I am vice president of the Independent Oil Men's Association, and we took a referendum on this proposition. I don't know whether the vote was ever reported to you or not. I can tell you something about it if you want to hear it.

Q. Over what territory, generally, do those members of the Independent Oil Men's Association do business? A. It is a nation wide proposition; that is, the United States.

Q. Does it cover the eastern territory of the United

196 *H. E. Mills, Direct*

States generally? A. Yes, sir. We have four vice presidents. The eastern territory is mine.

Q. What was the question which you say was submitted by the Independent Oil Men's Association to a referendum vote? A. They put out a referendum with regard to this tank and pump proposition, as to how many were in favor of it, and how many against it.

Q. When you say "with regard to the tank and pump proposition," you are referring to the leasing and loaning, under contracts which you have described
197 here? A. Yes; the leasing proposition on the basis of one dollar a year rent, which had been the practice in the trade theretofore.

Q. You personally conducted that investigation? A. I did not. I was one of the Board of Directors who noted the returns.

Q. You are acquainted with the whole procedure, however? A. Yes, sir.

Q. I will ask the witness what was the result of that investigation and the vote taken.

Mr. Speer: We object to it as incompetent, irrelevant and immaterial.

198 Examiner McCorkle: Were there minutes of that made on the books of the association—minutes of that vote?

The Witness: I believe so. The secretary keeps the minutes. I do not know whether he wrote them up.

Examiner McCorkle: It would be better to prove them by having the books here, I think.

Mr. Zechiel: Well, Mr. Examiner, there has been no objection made on that score by the attorneys.

Mr. Speer: I think the word "incompetent" would cover that.

199

Mr. Zechiel: I had not anticipated that Mr. Speer would take exception to it because of its veracity; but perhaps that was in his mind.

Mr. Speer: Not that I would question the veracity of the witness.

Examiner McCorkle: Without further argument, I think it is incompetent unless it is brought here through the minute books.

Mr. Zechiel: I will just reserve that question for the Washington hearing and we will take it up a little later. That is all.

200

CROSS-EXAMINATION by Mr. Nesbitt:

Q. What is the size of your company, Mr. Mills? A. You mean the capitalization?

Q. Yes. A. We are capitalized for two hundred thousand dollars.

Q. And you are doing business in central New York on a line from Albany to Rochester, both north and south of that line? A. Yes; lubricating oil, motor oil, factory oils.

Q. And your gasoline and refined oil trade is confined locally to Syracuse and Johnstown? A. That immediate vicinity, yes.

201

Q. I am not just certain what companies are in competition with your company. I wish you would name them again. Was it the Indian Refining Company, the Standard Oil Company of New York, the Crown Oil Company of Syracuse, and William H. Hall? A. And the Onondaga Oil Company.

Q. Those are the only companies? A. A new fellow came in recently and opened two filling stations, but he does not compete on tank wagon business.

Q. But there are no other competitors vieing with you there in that territory? A. I think the Texas Company came up from Amsterdam to Johnstown; but they have no station there.

Q. That is in your territory, the territory that your trade covers? A. Yes.

Q. That is the only place where the Texas Company is now doing business in the territory covered by your company? A. That is all I know of.

Q. Has your company's business increased during the last five years? A. Yes.

Q. Regularly so, from year to year? A. Yes.

Mr. Nesbitt: That is all.

By Mr. Speer:

203 Q. You gave, Mr. Mills, as one reason that you did not care to take up the furnishing and loaning of pumps, that it did not pay; that the amount sold through them was not large, and that it would take several years to get your investment back; and that in that time the pump would probably be worn out. Now, is it not a fact that, under those conditions, the operator of the pump would probably not be willing to put one in for himself, as he would have to pay for it, and as his business would be small, and it would wear out for him just as well, and would leave him at the end of a few years without any profit? A. Sure; it would probably wear out for him as
204 quick as it would for us.

Q. So that that objection, then, would have as much force to prevent his putting in a pump of his own as it would have to prevent your furnishing one? A. Yes; but he is making a larger margin on his gasoline than we are, net. He could stand that depreciation, possibly, where we figure that we could not.

Q. Probably if you furnished the pump he would be willing to accept a smaller margin than if he owned it? A. The price is the same, either way.

Q. That is, you are making the price the same? A. So is everybody else.

Q. Is it not a fact that in many cases on account

of this small amount of business which is done at these small filling stations, and on account of the expenses and the length of time in getting his money back, that many of these filling stations would not be established if the pumps were not furnished by the marketer? A. I think that is a great incentive for them.

Q. Don't you think that is a fact, that many of them would not be kept if the pump was not furnished by the marketer? A. I am not so sure on that. Some fellows have money and want to go into the garage business, and if you don't get to them before we do, we are pretty apt to sell them one for cash. 206

Q. If they thought their business justified it, of course they would buy one? A. Yes.

Q. And would sell gasoline anyhow. That would apply to a garage of considerable size, that expected to do considerable business? A. Not necessarily.

Q. Is it not a fact that many of these pumps are loaned or established at stores and places where there is not really a garage at all? A. Yes.

Q. And the amount of business which they handle is not large, and the operator, not knowing how much business he is going to do in the future, does not feel like taking a chance on making the investment, and would not put in a pump at all if one were not furnished him by the marketer? A. I think that is true of your smaller filling stations. 207

Q. You spoke about losing business that you had in certain garages on account of pumps having been loaned them by other marketers. Did those garages have pumps of their own in originally through which they were selling gasoline? A. Some of them did. They had smaller pumps. We also lost some consuming trade. We have one trucking company that is running seven or eight trucks, that came to our place and filled their cars at the curb price; they had to

drive about four or five blocks to get it. Someone put in a tank and a pump for them, and sells them their gasoline at the wholesale tank wagon market price; and they do not retail a gallon of gasoline, will not retail it. There are three or four cases of that kind in our town.

Q. There are a great many filling stations there, though—garages, are there not? A. There are.

Q. Some handle one gasoline and some another, do they not? A. Yes.

Q. So that a man can easily get, under this present
209 system whatever kind of gasoline he favors, can he not? A. Yes; he can get some he disfavors, too.

Q. You sell your gasoline under a trade name or brand, do you? A. We sell two grades of gasoline, sir. We sell export aviation gasoline, which we have handled for ten years prior to adoption by the Government. We also sell what we call our excelsior gasoline.

Q. And you sell those under your own brand? A. We do. We carry that brand throughout, on various products.

Q. And you like to have a sign up so that people will know— A. We have electric signs up on top
210 of the pumps, the same as the other fellows.

Q. Yours being a particularly good grade of gasoline, the public are desirous of getting it, are they not? A. Yes.

Q. You say that if others discontinued leasing pumps, you would also discontinue the practice? A. Yes.

Q. You figure that you would be able to hold your share of the business without establishing these little filling stations, do you? A. We do.

Q. In fact, is it not a fact that you objected to these little filling stations as a business proposition? You think they are unprofitable? A. I do.

Q. That is your real objection? A. Yes; they are an unprofitable business venture to the average oil company.

Q. You think a better business proposition is to have a service station, where you handle a larger quantity, and let the people come there to get their gasoline? A. I do. I think it is coming to that, on account of the irresponsible garage man that continually fails to pay his bills.

Q. And sells every kind of gasoline, and deceives the public; that is true, too, is it not? A. Yes.

Q. You think the people will quit going to those 212
places and will come to your station, where they know they are going to get the right brand? A. There may be some other places they can get good gasoline, too.

Q. Isn't it a fact, too, that your competitors have no stations like you have, and have nothing but these little filling stations? A. I think your question is wrong. Why do you say the large competitors? The smallest competitor we have has two filling stations in Syracuse.

Q. If this system was discontinued, they would probably compete with you in the future as well as they do now, would they not? A. Sure.

Q. You have quite a number of competitors, have 213
you not, who have no large service stations, but these small filling stations? A. You mean the curb pump proposition?

Q. Curb pumps? A. Yes; with the exception that you people at Syracuse sell the largest garage. We used to alternate that business with you month by month. This is getting into some of our own secrets up there, but this large fellow told me, a year ago, "Mills, we would like to deal with you"—

Mr. Speer: I object. I do not believe that is competent—

Mr. Zechiel: I am afraid it is going to be.

214

Mr. Speer: All right. Go ahead.

The Witness: He said, "You are a factor in the game here, and we want to give you some recognition, but," he said, "if we do not buy of the Standard Oil Company, they are going to put in filling stations."

By Mr. Speer:

Q. So that, in order to prevent their putting in filling stations and reaching the public direct, he was buying their gasoline? A. Your man was convincing
215 him that that was the best policy.

Q. Don't you think he was trying to keep them out of competition? A. Undoubtedly.

Q. They have the filling stations, have they not—the pump stations? A. Oh, yes.

Q. Notwithstanding his talk, they have curb pump stations? A. They have not any within six or seven blocks of this fellow.

Q. That is not very far, is it? A. It is when you find three or four in one block sometimes.

Q. He was afraid that if he did not buy gasoline from them, they would put in a curb station near him and sell to the public? A. Not a curb station, but
216 a drive-in station, a regular filling station.

Q. Wouldn't they have a right to do that? A. Certainly. Sure.

Q. There are some companies in competition in your territory that have nothing but these small—what you call curb stations? A. There are only three of us there.

Q. What three? A. The Crown Oil Company, yourselves and ourselves.

Q. You mentioned some other companies, I thought, that were doing some business there? A. They are doing business there but they do not have curb pumps out.

217

Q. How do they sell? A. William H. Hall has two stations of his own, and distributes from his main stations. The Onondaga Oil Company has no pumps or tanks out, except what they have sold. The Crown Oil Company sell benzol and cater to that business exclusively. They have all kinds of tanks and pumps out.

Q. Is not the point this: That the result of the establishment of these little curb stations is that they take business from the large stations that would go there if there were no curb stations? That is what it amounts to, is it not? A. I think in the long run 218
that is probably it.

Q. And by having the curb stations so convenient of access to the public, they stop at them and get their gasoline, instead of coming to your large service station? A. No, I think it is the other way, now. The service stations are getting established up that way, and the two best ones in town are put up by the Warren Oil Company, a new corporation last year there, and they are making big inroads, not only on your business, but my business. I think we have got to come to it.

Q. It costs a good deal of money to put up one of those service stations, does it not? A. That de- 219
pends on how elaborate a proposition you want to put up.

Q. Does it not pay to spend a little money and make it look attractive, and will not that draw the trade? A. Some of the larger companies have gone into that on a very large scale, very elaborately.

Q. What is your opinion about that? Isn't that a good business proposition? A. You want to make them an attractive proposition, to appeal to the public and catch their eye; but I do not think you need to put in as much money in smaller cities like we are located in as you would in New York, Philadelphia or Chicago.

220 *H. E. Mills, Cross*

Q. You do not think, however, that we ought to ask that they should not be allowed to spend so much money on their service stations, in order to draw trade? A. No. Some people advertise their gasoline in the newspapers. We never figured that we could afford to do that.

Q. You would consider that a bad business practice, would you? A. Not necessarily so, if you can afford it.

Q. Suppose a garage has a pump of its own, and is selling gasoline, and a marketer comes and offers
221 to loan them a pump; would not that lead to the establishment, in that garage of two pumps instead of one? A. Where is the second pump coming from? Are you going to put two pumps on one tank?

Q. A separate tank goes with it, to make the outfit complete. We will say a pump and equipment. When I speak of a pump I mean the entire equipment. A. Yes.

Q. Of course the tank part of it is really the most expensive part of the equipment, is it not? A. No, I don't think so. I think the pump costs as much as the tank. It depends on the size of the tank. The cost of installation is about twenty-five per cent of
222 your cost.

Q. Of course a separate pump is of no value unless you have a separate tank, is it? A. Sometimes they hook two pumps on one tank.

Q. Yes, but they would be selling the same gasoline through them both, would they not? A. They might put yours in one end and mine in the other, I don't know.

Q. That would be defrauding the public, would it not? A. Well, I don't know.

Q. Would you like them to do that with your gasoline? A. No; but we have been doing it with your tanks up there.

Q. You are willing to let ours be sold out of tanks with your label on, are you? A. You have done that, too.

Q. No man who loans a tank loans it with the intention of somebody else's gasoline being sold through it, does he? A. I don't think so, no.

Q. Is it not the purpose, in loaning it and placing it in there to furnish and develop a market for that product, under that particular trade brand? A. Yes; but if the man only has one tank and one pump, you limit him to one source of supply.

Q. Yes. A. And when you limit him to one source 224
of supply he is not free to do as he pleases. Suppose you run out of gasoline. According to your interpretation, and possibly mine, too, he would have to wait until you got some; but they don't do that.

Q. If I furnish him a tank and a pump through which he could only sell my gasoline, and he has no other, and I did not keep him supplied, isn't it likely that he would throw my pump and tank out and put in somebody else's? A. No. We have had several cases like that—some dissatisfaction, for example. For illustration, a man does not pay his bill. He has got your tank and pump leased. He owes you for a load or two of gasoline, supposed to be c. o. d., and 225
there is nobody there to sign the check or give the money. They call up the office, and the office says to leave it and get it the next time. The next time you have the same proposition. If it is out five or ten miles, you don't want to bring your load back; and you have got two loads in for him, they leave the second load. Then he gets sore at you because you try to collect the money, and he turns over and buys of us, and pays us c. o. d.; and then afterwards he goes back to you. This is on your leased tank proposition.

Q. He does that, as you might say, not openly; he does not notify us that he is selling somebody

else's gasoline through our tank? A. You will not sell him until he pays up what he owes.

Q. You think the beauty of the other system, of having him own it, is that then if he owes us a bill and will not pay it, he would go and buy from you and beat us out of our bill? A. Yes; he would hang up six or seven oil companies, if he could. He would not hesitate to do that for a moment.

Q. You think a trade practice that would permit garage men to do that is a good practice? A. I do not.

227 Q. You are advocating that he should own his own pump, so that he could switch when he wanted to, are you not? A. Sure.

Q. The result is that if he owed us a bill, and we insisted on having it paid, and would not furnish him any gasoline, he has his own pump, and he would buy from you, would he not, and not pay our bill at all? A. Yes; he would buy from me and the other fellow both, if he could.

Mr. Speer: That is all.

RE-DIRECT EXAMINATION by Mr. Zechiel:

228 Q. It is not a fact that you wish to be understood as saying that you think leasing and loaning of tanks should be done away with and your reason for it is that it enables retailers of gasoline to beat debts duly owing to some oil company that supplies gasoline? A. No; I think it is a bad practice, and an expensive practice; one not necessary.

Q. Mr. Mills, from your experience, do you think that the effect of doing away with the leasing of oil tanks and pumps, curbstone pumps and their equipments, the effect of doing away with that practice will be to drive all the gasoline business into what is commonly known as service station business? A. No

I think the leading garages of any community are bound to get a certain amount of business. The average curb filling station proposition is a joke, anyhow. At least a quarter of them are out of gasoline whenever you want any. If you go there on Sunday or a holiday and want some gasoline, they will say: "We haven't got any." And the reason for it is that they have not capital enough to do business, and the oil companies all try to get c. o. d. for their gasoline. They have storage for 550 or 1,000 gallons capacity, and the tank wagon man comes along and says: "Well, George, you had better put in 100 gal 230
lons of gasoline today," and he says, "I think there is going to be a snow storm and I don't think we will sell much tomorrow." Tomorrow is Sunday, and the sun comes out, and along in the afternoon, Sunday being a nice day, or by nine o'clock Sunday morning, perhaps, he is out of gasoline; and then he wants the oil company to work Sundays and nights and everything else to keep him supplied—which they do not do.

Q. Then it is your opinion that a certain amount of the retail gasoline business in your territory is going to be done in the future through service stations, regardless of what action the Commission may take 231
on this lease and loan proposition? A. Yes.

Q. Do you think that the action of the Commission on this lease and loan proposition will in any material way affect that business that is going to be done through the service stations? A. Eventually, no.

Q. Is it not a fact that even now, under the wide distribution of retail stations for gasoline, that a great many users of automobiles drive past these small curbstone stations and get their gasoline at the service stations? A. Yes, because they get service there. At the average pump there is nobody around to wait on them.

232 *H. E. Mills, Re-direct*

Q. Is it your opinion, or not, that the wide distribution of retail stations—I mean these curbstone pumps—the wide distribution of them, not in territorial extent but in numbers, has greatly convenienced the public in their ability to get gasoline when they run out? A. Not necessarily. For instance, there are several within a radius of two or three blocks of my residence, and I venture to say that I get a call at least once a week from some fellows who run out of gasoline and come to my house for it. I have no curb pump there.

233 Q. In your opinion, then, a large proportion of the curbstone pumps, so far as the public convenience is concerned, might be done away with, and still the public would not be inconvenienced? A. Yes. It seems to me, if the curb thing is to be followed, if they would place them on the main routes or thoroughfares instead of on the back streets and everywhere, they would get just as much gallonage, and would not need within twenty-five per cent of the pumps they have out now. I mean to say, they could cut down about seventy-five per cent of the pumps, and get the same gallonage, if they placed twenty-five per cent of them properly.

234 Q. And the public would not be inconvenienced through such a practice? A. No.

Q. You testified, on cross-examination, that you used signs on your pumps to advertise your gasoline? A. Yes; we use electrical signs, and we use road signs.

Q. And having in mind certain advantages growing out of the present system of leasing and loaning pumps, do you still say that, if it were not a competitive necessity for you to engage in this leasing method of doing business—in other words if everybody else quit it—do you still say that you would prefer not to lease and loan pumps and would not do so? A. Yes.

Mr. Zechiel: That is all.

RE-CROSS EXAMINATION by Mr. Speer:

Q. Mr. Mills, if the public does not patronize these curb pumps, managed in the way you say, where they have not gasoline half the time, how does it come that they have so taken away the business from the large service stations and from yours, too, as to make it necessary for you to put in curb pumps in order to hold your business? A. They have not. The drive-in filling station proposition is a new thing, making inroads on the curb pump proposition.

Q. Then don't you think the curb pump people ought to be complaining to the Federal Trade Commission to stop a practice that is taking away their business?

Mr. Zechiel: Now, if the Examiner please, it does strike me that that question is a little impertinent.

Mr. Speer: If you object to it, I will withdraw it, and put it in a different way.

By Mr. Speer:

Q. Don't you think, then, that these new service stations that you say are being established as a new thing, and are taking away the business—don't you think there would be as much justification to object to that as an unfair practice because it is taking away the business from the curb man, as it is for the other marketers or service stations to object because the curb man is taking away their business? A. No. The drive-in filling station man gives you service, nights, days and Sundays. Your curb proposition is an eight or ten hour proposition—if you can get it then. The idea is that there is a lot of them in the curb business today who are trying to do business on

your capital and mine, and they will not buy a thousand gallons of gasoline when you come along. They will buy one hundred gallons, and as quick as they sell that, they give you a fire department ring to come right down with some more.

Q. If you own the tank, are you not in a position to control the manner in which it is operated and the amount taken? A. I wish it were so.

Q. If they do not take sufficient to justify doing business with you, you can take the tank away? A. Sure, and somebody else will put one in.

239 Q. He will not put it in unless there is something in it for him? A. He will have to find that out.

Q. The result would be that if these curb filling stations were discontinued, then the marketers who were doing business there would have to withdraw from that territory, unless they went to the expense of putting up these expensive service stations? A. No. They could continue their curb filling stations that paid them, and those that did not they could take out, and locate them in new places.

Q. I say, if the practice was discontinued, those who are marketing their product in that way would have to withdraw from the territory, or they would

240 have to establish the large service stations, would they not? A. Not necessarily. They could sell their pumps, and the fellows that own them could operate them.

Q. That would not make any difference as to this practice—whether the pump was leased or owned by the operator, so far as the public is concerned, would it?

Mr. Burdeau: I object to that, as stating a fact, and not asking a question.

By Mr. Speer:

Q. As I understand, your objection is to this curb

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pump, that method of distributing the product. You say that is a bad method and it ought to be done through the service stations; that it can be done better that way? Isn't that your theory? A. Yes.

Q. And it does not pay to have in these curb pump stations? A. I say there are lots of them that do not pay. Some do pay.

Q. You think they should be discontinued entirely? A. I do.

Q. And that the public would be just as well accommodated by going to the large service station?

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Mr. Zechiel: I think there is some confusion as to what the question means, when you say "they" should be discontinued entirely. Evidently no one knows whether he is referring to the pumps or the lease contracts.

Mr. Speer: I am speaking of the pumps; the whole system of using these curb pumps.

Mr. Zechiel: That is, it makes no difference whether they are under lease or whether they are owned outright?

Mr. Speer: Yes.

Mr. Zechiel: All right. I just wanted to understand where we were.

243

(The reporter repeated the pending question as follows):

"Q. And that the public would be just as well accommodated by going to the large service station?"

The Witness: Yes.

Mr. Speer: That is what I understood. Your theory is that the whole system of distributing through the curb pumps is a bad practice and unprofitable?

The Witness: I think the whole thing is, yes. I think the lease proposition is the worst part of it.

Mr. Speer: That is all.

244 *J. W. Runyan, Direct*

Mr. Burdeau: Would you have any objection to the system of distribution through curb pumps if these various separate owners of curb pumps financed themselves, and did business independently of any assistance from you?

The Witness: I do not think so.

(Witness excused.)

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245 J. W. RUNYAN, was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. State your name and address, please? A. J. W. Runyan, 4528 Chestnut Street, Philadelphia.

Q. With what concern are you associated? A. S. F. Bowser & Company, Fort Wayne.

Q. What is your position in that company? A. I have charge of several salesmen in the Pennsylvania territory.

Q. How long have you been in your present employment? A. Twenty-eight years, approximately.

246 Q. How long have you been manager over the present territory? A. Possibly about five years.

Q. What has been your business experience in the territory which you are in? Have you been manager always in that territory? A. Not always. In the five years I have, yes, in this territory; but I have filled various positions with the Bowser Company for the number of years I have been with them.

Q. Has your position been out in the field for the Bowser Company or in the home office? A. Out in the field, mostly.

Q. What is the general business method of the Bowser Company, that is, its general method of con-

ducting its business of selling? A. The sale of gasoline and oil storage systems to the trade throughout the country.

Q. How is that accomplished? A. Through salesmen.

Q. If you will describe the whole situation a little more completely? A. We have various branch offices situated over the country, and in some localities, possibly Philadelphia, for illustration, covering territory—well, the City of Philadelphia, Philadelphia County and possibly five or six other counties in and around Philadelphia; take our Albany district, and 248
they will take in a larger scope, the New England States, some of Pennsylvania, New Jersey, likewise throughout the organization, various places along that line.

Q. How are your sales effected? How do you accomplish them? A. By selling direct to the trade.

Q. What is the general trade which you solicit? A. Our trade has varied. We sell virtually any class of trade that handles oil, that has to have a pump or storage system.

Q. You are speaking of lubricating oils as well as gasoline? A. Lubricating gas, coal oils, all kinds of oil. 249

Q. You also, in that connection, solicit garages and other retailers of gasoline? A. Yes.

Q. You enter into contracts with various purchasers of your equipments? A. We have an order form, what you might call a contract. We sell the man an outfit, and he naturally signs an order, and it is sold either on our short term basis, or discount, or on a thirty day proposition, or sometimes even longer; it depends on conditions.

Q. How are your orders filled and the goods delivered? A. Just how do you mean? How we fill them direct ourselves?

250 Q. Yes. A. We have various warehouses. At Albany we have a warehouse, and some we ship direct from the home office; at San Francisco we have an office that we ship from, and various places. It depends on the location.

Q. You ship the goods to the individual customers who buy them? A. Yes.

Q. From your home office at Fort Wayne? A. Yes.

Q. What is the average value of the equipment you sell—single equipment, sold to garage men and other
251 retailers? A. It will depend on where the equipment is to be used. Sometimes it is an inside pump, and that would be a different kind of a pump than a pump on the curb, or for a filling station, or something like that.

Q. Speaking generally of curbstone pumps, what is the average? A. We sell pumps with five gallon capacity, that will draw five gallons at a stroke, or an intermediate amount, and then we sell pumps that draw a gallon at a stroke, quarts, pints and half pints.

Q. And the five gallon pump has, on an average, what selling price? What is the value of the pump and equipment—which I understand includes the tank?
252 A. The equipment plant?

Q. Yes; what does such an outfit with an ordinary five gallon pump as you describe it, sell for? A. It will approximate around six hundred dollars.

Q. And your inside pumps that you speak of? A. That will depend on the size of the tank. The price of the equipment is based on the size of the tank. It may run two barrels or thirty, or five or ten.

Q. Do you have a separate price for the tank from the price of the whole equipment? I mean, is the tank priced by itself? A. Sometimes, yes.

Q. About what part of the whole cost is the cost of the tank? A. I should say the tank will cost pos-

sibly one-third, as a rule. That depends, largely, of course, on the size of your equipment and the size of this tank sold.

Q. But on the average the tank will be about one-third? A. I should say about one-third, yes.

Q. In your experience, with your company, have you had occasion to come into personal contact with the retailers of gasoline in your territory? A. Through the garage people and store people, along those lines.

Q. What is the geographical experience in that connection that you personally have had? A. Just how 254
do you mean?

Q. Your personal contact, more or less intimate personal contact with the retailers themselves. A. I do not know just how to describe it, but along those lines we will call on a garage man, and try to interest him—

Q. I think you misunderstand the question. I will ask to have it read.

(The question was repeated by the reporter as above recorded.)

By Mr. Zechiel:

Q. I mean, is it all in Pennsylvania or— A. Oh, I 255
see. It is in various parts of the country; that is, in the twenty-eight years I have been with the firm I have covered various sections of the country.

Q. And in the last few years what has it been—say the last five or six years? A. The eastern section.

Q. Is that all over the eastern part of the United States? A. No; that would take Pennsylvania, New Jersey, the sections down through West Virginia and Maryland.

Q. In the territory over which you have had this personal experience, what is the fact—do the retailers generally have more than one oil tank and pump equip-

256 *J. W. Runyan, Direct*

ment established in one distributing center? A. It will depend on the volume of business that it does, in lots of cases.

Q. What is the general fact? A. I can cite you some cases; in Reading, Pennsylvania, for illustration, there is one dealer who has in the five gallon pump only, and his business approximated fifty thousand gallons last year, through one five gallon pump.

Q. I do not know that my question is clear. I will ask to have it read.

257 (The reporter repeated the question as follows):

"Q. In the territory over which you have had this personal experience, what is the fact—do the retailers generally have more than one oil tank and pump equipment established in one distributing center?"

The Witness: You mean individually?

By Mr. Zechiel:

Q. Yes. A. It will depend on the volume of gas he sells. If he has a large trade, and his business justifies two pumps, he will put in two pumps. If one pump will do the business, lots of times he has but

258 one.

Q. Just as a matter of counting noses, from your best judgment about it, do more have two or less have two? A. Less have two, I would say.

Q. About what is the proportion? A. I would say that eighty per cent of them have one.

Q. Of those who have two pumps, what per cent of them are selling the gasoline products of more than one oil company at the same time? A. I would say possibly half.

Q. In your experience, if you know of your own knowledge, has your company lost business because of the practice of certain oil companies of leasing and

loaning oil tank and pump equipments at a nominal consideration?

Mr. Speer: We object to the question as incompetent, immaterial and irrelevant.

Examiner McCorkle: The objection will be noted. Answer the question.

The Witness: In the territory I have jurisdiction over I would say yes.

By Mr. Zechiel:

Q. Narrate more in detail, to whatever extent you 260
can, what the effect of this practice by various oil companies has been upon your company's business. A. To speak for the entire company I could not say. For the territory that I have jurisdiction over, and which is local—I am not familiar with the other end of it; the other side I don't know, on the outside.

Q. I don't know what you mean by the "outside." A. Outside of my own jurisdiction.

Q. I am speaking only, now, with respect to your own personal knowledge and in your own territory. A. I see. I would not like to say just the amount, but there has been numbers of instances whereby we have lost business by methods of the kind you men- 261
tioned.

Q. Can you recall the occasions of the loss of that business? A. Not absolutely; that is, I cannot just go into detail on all of them; but there are some instances where our salesmen have worked with a customer to sell a customer, and the customer had been worked up to a certain point, and he would say: "Well, now, I will not place my order today, but I want to investigate a little bit," and possibly the next trip the customer would say: "I can get an outfit on a lease proposition for one dollar a year," or something like that; so we have lost out on it.

262 *J. W. Runyan, Cross*

Q. What would you say about the number of such occurrences in your territory—few or many? A. I would not like to say just what number.

Q. At any time while you have been general manager over that territory, have any of your sales organization complained of this practice as affecting their business?

Mr. Speer: I object to that as incompetent, immaterial and irrelevant.

Examiner McCorkle: The objection will be noted.

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The Witness: Yes.

By Mr. Zechiel:

Q. If you know, what has been the effect upon your sales force in your territory particularly, brought about because of this general practice on the part of oil companies leasing pumps for a nominal consideration? A. Well, it has occasioned the loss of an order.

Q. Has there been any other effect than just the mere loss of orders? A. Well, I would say that is about all. It loses us the business.

Mr. Zechiel: That is all.

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CROSS-EXAMINATION by Mr. Nesbitt:

Q. Mr. Runyan, the headquarters of your company is where? A. Fort Wayne, Indiana.

Q. You are known as a member of the sales force of that company? A. Yes, sir.

Q. About what percentage of the installations of pumps and tanks in the territory that you cover are manufactured by your company now, could you say? A. I could not, no, sir.

Q. Are there a good many of the Bowser equipments in your territory? A. Yes.

Q. Do a good many of the people who make these installations in your territory at nominal rentals purchase from your company and use your tanks and pumps? A. Yes; some do, yes, sir.

Q. Will you tell us how the sales that are made by you or your men directly, are handled; that is, after the order is booked, what is the process by which the sales are handled? A. That is, where we sell to the individual?

Q. Yes. A. We simply take an order on an order form, the order is sent into our warehouse, and it is shipped from there. 266

Q. Sent into your warehouse where? A. Albany.

Q. That is where you carry your storage for that territory which you have in charge? A. Yes.

Q. Then that pump or tank is shipped direct to the customer? A. To the individual, yes.

Q. That is, where you have solicited directly, or one of your men has, the purchase, and made the sale? A. Yes.

Q. Now, where a company is making an installation, an oil company, at a nominal rental, how is that handled as regards the sale of the tank? A. That is taken up between the oil company and the firm themselves. The salesman has nothing to do with that. 267

Q. That does not reach you or your staff? A. No, sir; I have nothing to do with that.

Q. Is this practice of installing, not necessarily under leases at nominal rentals, but are these curb stations a common thing in your territory? A. Yes, sir.

Q. And there are a great many leases, I suppose, made at nominal rentals? A. I imagine so, yes, sir.

Q. Is it your idea that there are more installations of pumps and equipments as a result of this practice than there would otherwise be? A. Well, it might be possible that there are.

Q. What is your opinion about that? What is your belief? A. I would imagine that there are.

268 *J. W. Runyan, Cross*

Q. That is, that the equipment business had been extended as a result of that practice? A. I would imagine so.

Q. And your company has gotten its share of that business, has it? A. Well, that I could not answer. I could not say just exactly about that.

Q. As far as you know that is true? A. As far as I know, yes, sir.

Q. The Bowser Company is one of the largest companies manufacturing this sort of equipment, is it not? A. Yes.

269 Q. And your business has grown all during the period that we have referred to generally that this practice has been engaged in, say for the last five years? A. Yes; our business has increased.

Q. It has extended all during that period? A. On account of more automobiles being used, more cars being used?

Q. And more stations? A. Yes.

Q. You don't know, personally, then, do you, just what channels these pumps are put in to the people at whose stations the installation is made, when they are put in by the oil companies, or when they are leased by the oil companies at a nominal rental? A. No; that

270 is handled direct by the firm.

Q. And you do not touch them in any respect? A. No.

Q. This is the only territory that you have had charge of the sales in for the Bowser Company; is that right? A. For the last five years.

Q. And during that period have the sales of your men, or made by you yourself, increased from year to year? A. Yes, sir.

Q. Regularly so? A. Yes, sir.

Q. That is, the sales made, irrespective of the sales that are made direct from Fort Wayne to the oil companies? A. The natural growth of the automobile business has made it so, yes.

Q. And it is true that the business has grown in your office all during that period? A. Yes.

Q. Then is it true that you have lost any business? And when I say, "you" I mean the Bowser Company. Could it be said that the Bowser Company has lost any business as a result of this practice by the oil companies of making installations at nominal rentals? A. There are numerous cases where salesmen have lost it, yes, sir.

Q. Your reference there is to a loss to the individual salesman? A. In his individual territory, yes.

Q. You are not referring, there, to a loss to your 272
company? A. Not to the firm's loss, but the salesmen's loss in the territory.

By Mr. Speer:

Q. As I understand, Mr. Runyan, the salesman in a territory only gets credit for sales he makes direct? A. Yes.

Q. And if the oil company is leasing or loaning pumps, or handles them and buys them direct from the company, and they are shipped in there and furnished to the trade, the local salesman does not get credit for that sale? A. He would not, if it went to a company who did not deal with the Bowser Com- 273
pany.

Q. So that in the very territory where the salesman may have lost sales, the company itself may have made other sales to make up. A. Possibly.

RE-DIRECT EXAMINATION by Mr. Zechiel:

Q. Do you know whether or not the Bowser Company sells oil tanks and pumps at the present time to the Atlantic Refining Company? A. I do not think they do. There may be isolated cases where they may.

Q. Your territory is wholly within the territory

274 which the Atlantic Refining Company sells? A. Yes, sir.

Q. Do you know what make of pump the Atlantic Refining installs under lease and loan contracts? A. Yes, sir.

Q. What pump is that? A. The Gilbert and Barker, designated as the G. & B.; known as the G. & B.

Q. Do you sell pumps to the Texas Company used in that territory? A. Yes.

Q. And the Gulf Refining Company; do you sell to the Gulf Refining Company? A. Yes.

275 Q. If you know, Mr. Runyan, about what proportion of the installations of oil tanks and pumps in your territory have been made by the Atlantic Refining Company and of G. & B. pumps? A. I would not like to say.

Q. You have no notion about that? A. No, sir, I have not.

Q. You do not know what per cent of the total installations in your territory are Bowser equipments? A. No, sir, I do not.

Mr. Zechiel: That is all.

(Witness excused.)

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WILLIAM F. EICHELBERGER, was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. State your name and address, please. A. William F. Eichelberger, 618 Walnut Street, Allentown, Pennsylvania.

Q. What is your affiliation; with what company? A. E. F. Bowser & Company, Fort Wayne, Indiana.

Q. What is the section or portion, geographically, of Pennsylvania, over which you sell goods? A. Northampton, Lehigh, Munroe, Wayne.

Q. Those are counties? A. Yes, sir.

Q. In and about what large cities? A. Easton, Bethlehem and Allentown.

Q. Over how much territory on that portion of Pennsylvania do you do business? A. I do not get what you mean.

Q. Three miles wide by ten miles long? A. I cover the entire counties.

Q. And how much of a territory is that? A. I 278
am just trying to find out how much you cover geographically. A. Five counties.

Q. How long have you been connected with Bowser Company? A. Thirteen years.

Q. During that time have you been sales agent for the company? A. Just salesman, yes, sir.

Q. And your duties in that connection are soliciting orders for oil tanks and pumps? A. Yes, sir.

Q. What has been your experience, in a general way, in your territory, as to whether garage men have usually just one installation, or more than one installation? A. In my territory there are quite a few that have two or more; some of them have three. 279

Q. What percentage, should you say? A. Oh, well, about eighty per cent only have one pump; seventy-five to eighty per cent.

Q. And of the rest, do they sell more than one kind of gasoline at the same time? A. Yes, sir; some of them do; others do not.

Q. About how many; what per cent? A. I would say about fifteen out of twenty sell more than one kind.

Q. In connection with your business in selling oil tanks and pumps, have you ever lost sales because of the practice of oil companies of leasing and loaning

such equipments for a nominal consideration? A. Yes.

Q. Describe that in detail. A. I have lost quite a few. For instance, I have gotten inquiries, written inquiries, into the home office, and the inquiry is forwarded to me, and I call on the party, and when I saw the party and quoted them prices, they stated that they had other prices from other concerns, two or three or four, and they also had offers of putting in tanks on a loan basis at a dollar a year.

Q. When you speak of tanks, are you including
281 pumps or not? A. Outfits; I should say complete outfits, either five or one gallon pumps.

Q. Did you sell to such customers? A. Not as a rule. You might say about five per cent.

Q. Of sales, you mean? A. Yes.

Q. That you sold? A. Yes; not more than that

Q. Do you know what the ultimate outcome was in those cases, whether they all bought equipments of some other company or whether they took such equipments under lease and loan? A. Most of them under the loan proposition.

Q. How frequently has that been in your territory —just in a general way? A. Quite frequently.

282 Q. To whom do you sell your equipments when you make sales? A. Factories of all kinds, garages, general stores.

Q. Do you sell in large and small cities alike? A. Yes, sir.

Q. To grocery stores? A. Yes; we sell a number of them to grocery stores through the country.

Q. What would you say about the percent of equipments that are installed in your territory—whether or not they are under lease or loan installations, or under outright sales? A. That would be hard for me to say.

Q. If you have any impression, we would like to

have the benefit of it. A. Well, there are certain parts of the territory where there might be ninety per cent, and others only ten per cent.

Q. When you speak of those certain parts being ninety per cent, do you mean ninety per cent lease and loan? A. Lease and loan, yes.

Q. Do you know why there are more lease and loan installations in one territory than in another? A. What I referred to in a certain portion of the territory having ninety per cent, and another ten, is this: The ninety per cent would be in a thickly populated territory.

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Q. Does that mean stiff competition between the oil companies in the sale of their products? A. Yes.

Q. And the occasions where a large per cent, ninety per cent, are direct sales—they are in less highly competitive areas? A. Yes, sir.

Q. Is there any difference in those two areas as to the quality of gasoline that is sold from installations? To make the question more definite: In the instances where there are leases or loans, do you find a greater volume of business than in the territory where they are sold? A. I find in some parts of the territory where the outfits are loaned that some of them do not sell one hundred gallons a month. They are stuck in so 285
thick in some parts that if each one gets a portion of the business that goes through there, neither one of them gets very much.

Q. From your experience, do you think the public has been benefited by the large distribution of oil tanks and pumps under lease contracts in the highly competitive areas? A. No.

CROSS-EXAMINATION By Mr. Nesbitt:

Q. Mr. Eichelberger, you have been in Allentown how long, with the Bowser Company? A. Approximately thirteen years.

Q. Located there all during that period? A. No; I was located at Pen Argyle three years before going there.

Q. The installations of pumps and tanks are numerous in your territory, I understood you to say? A. Yes.

Q. Your territory has increased in business during your time in Allentown? A. Oh, yes, indeed.

Q. There are relatively as many installations of the Bowser Company there now as there were five years ago; is that true? A. Oh, yes.

287 Q. More, are there? A. More so, yes.

Q. Is it a fact that the practice of loaning or leasing at nominal rentals these installations has increased the sales made by your company in that territory? A. That I could not answer.

Q. What is your idea about it? Are there more Bowser equipments in your territory now, than there would have been if this practice had not been adopted? A. No; I think there are less.

Q. I understood you to say that the practice of loaning and leasing the equipment at nominal rental increased the number of such installations generally; that is true? A. Yes, sir.

288 Q. And increased them in your territory? A. Yes, sir.

Q. I also understood you to say that there were relatively more Bowser equipments in your territory now than there were five years ago? A. Yes.

Q. Relatively, remember I am saying. There are relatively more Bowser equipments in your territory now than there were five years ago. A. No.

Mr. Burdeau: Did he fully understand your question?

Mr. Nesbitt: I have asked it twice.

The Witness: What do you mean by that?

By Mr. Nesbitt:

Q. I mean, taking all of the installations of tanks and equipments in your territory, and then take what percentage of those equipments are Bowser equipments: is that percentage greater now than it was five years ago? A. No; I do not think it is.

Q. Is it as great? A. Those are hard questions to answer.

Q. I realize that perhaps the figures might be hard to give; but if it is a question of your trade having been affected, I think you would be able to answer them. Can you give us an answer? 290

Mr. Zechiel: If you know, Mr. Eickelberger.

By Mr. Nesbitt:

Q. Has the Bowser Company been getting its share of the business in the last five years in your territory? A. I think they have, yes.

Q. When sales are made to oil companies of Bowser equipments, they are made through some other channel than through you in your territory? A. Yes; I have nothing to do with that whatever.

Q. You do not get a commission on them? A. Yes, sir, I do. 291

Q. You do get a commission on them? A. Yes.

Q. Then any installation of Bowser equipment that is made in your territory is reflected in your pay? A. To a certain extent.

Q. You receive a less commission when the sale is made direct to an oil company? A. Yes, indeed.

Q. But in no instance where the sale of equipment is made to an oil company for installation in your territory is the negotiation through you? A. No, sir.

Q. Nor do you get a full commission on it? A. No, sir.

292 *William F. Eichelberger, Cross*

Mr. Nesbitt: That is all.

By Mr. Speer:

Q. If I understood you correctly, in quite a few cases where garages have more than one pump and tank outfit, they still sell but one kind of gasoline? A. Yes, sir.

Q. And in other cases where they have more than one pump and tank outfit, they handle different brands of gasoline? A. Yes, sir.

Q. Did I understand that all of the pumps manufac-
293 tured and sold by your firm have a capacity of five gallons? A. Oh, no; no, sir; from one quart up to five gallons; some one quart capacity; others two quarts; others a gallon, two gallons or five gallons.

Q. You cannot deliver but one gallon A. Oh, no; a pint, half pint, quart and gallon.

Q. When you speak of a gallon pump you mean it only can deliver a gallon? A. Oh, no; they can deliver a pint, a quart, half a gallon or a gallon.

Q. Up to a gallon? A. Yes, sir.

Q. Then you have others with which you can deliver up to how much? A. From a pint up to five gallons.

294 Q. Is there any difference in the price? A. Yes, sir.

Q. Are there not some pump manufacturers that make pumps that only deliver a gallon? A. I could not say.

Q. You don't know? A. No, sir.

Q. If, instead of loaning the pump, the company would make the operator their agent and allow him a commission on the sale of gasoline, own the equipment and the filling station and create an agency, that would not help you any in the sale? A. I have no filling stations in my territory.

Q. There are not? A. No.

Q. But if that was done—if the company was buying some other firm's tank and did put in that kind of a station instead of loaning the pump, and would make it an agency, and own the station and employ the operator as their agent, they still would put in the pump they were handling, and it would not help you any in making a sale, would it? A. No, sir.

Mr. Speer: That is all.

RE-DIRECT EXAMINATION by Mr. Zechiel:

296 Q. If you know, about what proportion of installations made in your territory are G. & B. equipments? A. What proportion?

Q. Yes. A. About fifty or sixty per cent.

Q. What company installs those? A. The Atlantic Refining Company.

Q. Any other company? A. No, sir.

Q. Does the Atlantic Refining Company install any Bowser equipment? A. No, sir.

Q. Do you know whether the Atlantic Refining Company installs any other equipment than the G. & B.? A. I do not.

Q. You mean you do not know whether they do, or you do not know of any case where they have? A. 297 I do not know of any case where they have.

RE-CROSS EXAMINATION by Mr. Nesbitt:

Q. When the Texas Company has made installations in your territory, or has leased installations, have they been Bowser equipments? A. The Texas Company has never installed an equipment in my territory.

Q. What companies have made installations in your territory? A. The Gulf Refining Company, the Pure Oil Company; only those two.

Q. Whose equipment did those companies install—

298 *William F. Eicheberger, Re-cross*

of what manufacture? The Bowser? A. Some Bowser and some Rapid Dayton and some Wayne.

Q. As these companies come in to compete in that territory, was not the sale of the Bowser equipment aided, increased, as a result of this leasing at a nominal rental? A. No, I do not think it was. The biggest increase in sales that we saw was before the rental ever started.

Q. The leasing in your territory has been going on for about how long? A. I presume about six years. I do not think it is longer; five or six years, I could
299 not just say.

Q. Is it your idea that there would be just as many installations of Bowser pumps in your territory if this practice were not engaged in? A. There would be more.

Q. Do you believe there would be just as many curb stations in your territory as there are now? A. Curb stations? I think there would be more.

Q. Then I understand that the experience in your territory is utterly the opposite of the experience of Mr. Runyan in his territory? A. I understood you wrong. You mean that the entire installation would be more? I understood you wrong there. No; it
300 would not. It would be less.

Q. You agree that it would be less; that there would be less Bowser pumps sold in your territory if this practice were not engaged in? A. That I could not say.

Q. That there would be less pumps, though? A. Oh, yes.

Q. You have already testified that you felt that the Bowser Company had got its share of the trade in your territory during the last six years; is that true? A. I think we have got our share, yes; not saying that we could not have got more.

(Witness excused.)

P. H. LEMEN was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. State your name and address. A. P. H. Lemen, Audubon, New Jersey.

Q. With what concern are you connected? A. The F. S. Bowser Tank Company.

Q. In what general geographical territory do you do business? A. South New Jersey.

Q. How long have you been with the Bowser Company? A. Four years. 302

Q. During that time have you always been in this same territory? A. Within a county or two, practically, south of the White Morris Pike.

Q. What is your general business? A. The sale of our equipment, any equipment containing oil or oil storage systems.

Q. In connection with your business, have you ever lost sales of your goods because of the practice of oil companies in leasing and loaning such equipment for a nominal consideration? A. I have.

Q. State those facts more in detail, as to the loss of your business of that sort. A. Starting with a prospect, or an inquiry, or a lead, that you dig up yourself, you go to sell the man, and sometimes you have him sold, and sometimes you may return in a day or two and you will see the outfit on the ground from an oil company, or possibly installed, or he will tell you that he has signed a contract for the free outfit; and of course you have lost your sale. 303

Q. Has that sort of thing happened frequently, in your experience, in your territory? A. Yes, sir.

Q. Do you know any specific instances of that sort? A. Just as to leasing and sale?

Q. Yes. A. Yes.

Q. Describe it. Give the facts about it. A. That

would be the whole fact, in each case. I had a case in Collingwood, Yorkshire Village. A man called me up, and I was to meet him at four o'clock, and the Standard Oil man—I have to change my car about twice a year, so that they cannot tell who I am and—

Examiner McCorkle: You need not go into so many details.

By Mr. Zechiel:

Q. No; not quite that fine. I just want the general situation. A. When I returned at four o'clock to
305 close the deal, he had signed up for a free outfit.

Q. What is your experience, in a general way, in your territory? Do garage people have more than one installation? A. Yes, sir.

Q. Is that the common practice? A. The larger garages in my territory, nearly all of them, have two pumps, one from each company; or they may have a Bowser owned outfit, and an oil company pump.

Q. When you say one from each company, are you speaking with respect to leased equipments? A. Yes.

Q. What are those? Are there only two companies in your territory that are leasing and loaning equipments? A. Three; and there have been four.

306 Q. What are those companies? A. The Standard, the Gulf, the Texas and the Crew Levick.

Q. In your testimony as to the loss of business, as you have described it, does that apply to each of these companies? A. Yes, sir.

Q. You say that, in your opinion, in the majority of cases, the retailers of gasoline have more than one equipment installed? A. That is the larger garages. In some cases—a short time ago there was one garage that had three outfits.

Q. What per cent, would you say, have more than one installation? A. Well, I could not give you the exact figures, but I would say in my territory twenty

garages would have two outfits; twenty good large garages.

Q. In those instances where they have installed more than one outfit, are those outfits owned by the garages, or are they leased equipments? A. Mostly the two outfits are loaned, but there are cases where a man will own an outfit and have a leased outfit.

Q. Is there any general difference, geographically, in this percentage of more than one outfit installations? A. On the main highways, like the White Horse Pike, or the Sweedsboro Pike, or the Woodstown Pike, or the Burlington, you will find the large garages with 308
two outfits.

Q. In the more highly competitive area? A. Yes; but in the country territories you will only find one.

Q. To whom do you make your sales, where you sell Bowser equipments? A. If I can get there first, to commercial users.

Q. Is there any difference in the amount of gasoline, general sale of gasoline gallonage in the parties to whom you sell your pumps and those who lease and loan such outfits? A. Yes; my sales are made to the smaller users. Very seldom do I get a chance at a large user.

Q. Are your sales more confined to rural territory, 309
or do you have a general sale through the entire territory? A. You are speaking of just the gasoline sales, or any of my sales?

Q. I am talking about your sales of gasoline pumps. A. Gasoline pumps are mostly to the large farms or farm estates, like, as one, Hadden Hall Farm, or Chalfonte, where they can afford to put in their own equipments, and the oil companies do not make very often delivery; or a large furniture house.

Q. Do you sell such equipment to retailers in the more rural portions? A. Yes; that is, if we can.

Q. Does the Standard Oil Company of New Jersey install any Bowser equipment? A. No.

310 *P. H. Lemen, Cross*

Q. The Gulf Refining Company? A. Some.

Q. The Crew-Levick? A. Very few.

Q. The other company was the Texas Company? A. The Texas? They have in the past, but not so much lately.

CROSS-EXAMINATION by Mr. Nesbitt:

Q. Did you say, Mr. Lemen, that the Texas Company had not installed Bowser equipment recently in your territory? A. No, sir; they have been using the
311 Rapid Dayton.

Q. You are certain about that, are you? A. Yes, sir; I was very much disappointed in them. I went to look at a number, and found they were Rapid Daytons.

Q. Within what time have you noticed that? A. This fall.

Q. How long did you say you were located in South Jersey? A. Four years.

Q. With headquarters in Camden? A. Philadelphia and Harrisburg.

Q. Is the Bowser Company installing equipment in that territory now? A. Now?

312 Q. Yes. A. You mean outright sales?

Q. Any way. A. Yes, sir.

Q. Do you have any idea what percentage of the pump and tank equipment is Bowser equipment in that territory? A. No, sir.

Q. You have no idea what percentage? A. Not what the Bowser Company have; no, sir.

Q. Has the business of the Bowser Company increased since the time that you have been in that territory? A. I cannot speak for the firm. My business has increased, but not due to the gasoline business; it has been due to the kerosene or lubricating oil business, and not to the gasoline business, sir.

Q. To what special articles do you refer of the Bowser manufacture, when you say your business has increased through kerosene and lubricating oils? A. My business, up until September 15, was, you might say, seventy or eighty per cent lubricating oil tank business—oil filters, kerosene oil tanks and specialties, such as hose; but my people are complaining, now, that—where they got this information I don't know, but they say due to a temporary injunction they cannot get any more gasoline tanks; and I sold more gasoline tanks since September 15th than I did all year; but now my lubricating oil business has 314
fallen off, because the Standard Oil Company has promised as soon as the temporary injunction is removed that they will give them oil tanks.

Q. Mr. Lemen, is it the practice in your territory for oil companies to lease any of this equipment that is used in connection with lubricating oil and kerosene? A. The Standard Oil Company are starting it now, sir.

Q. They have not been hitherto? A. They are promising the outfits, and signing the contracts.

Q. But it has not been the practice of any of the oil companies in your territory to lease that sort of equipment, has it, at a nominal rental? A. I can- 315
not say as to a nominal rental. They are taking and signing up contracts on oil, and promising oil tanks.

Q. Have you seen those contracts? A. No, sir.

Q. Have you seen any of the contracts used for loaning and leasing equipment in your territory? A. No, sir.

Q. Then I understand that your testimony is this: That your sales of tanks and pumps for the handling of gasoline have not been affected by this practice of oil companies loaning and leasing equipment at a nominal rental. A. It has on the gasoline; yes, sir.

Q. Since when? A. Since I have been with the firm.

316 *P. H. Lemen, Cross*

Q. What part of your business is it that has been affected since September by a practice of the oil companies? A. The lubricating oil business. The gasoline business has increased.

Q. Then you are selling more Bowser equipments in your territory now? A. Yes; due to the temporary injunction that the people tell me of.

Q. What injunction?

Mr. Zechiel: He is speaking of Docket No. 85.

Mr. Nesbitt: The Indiana—

317 Mr. Zechiel: Yes; I suppose so. That is the only one I know of.

By Mr. Nesbitt:

Q. None of the companies are leasing equipment down in your territory now? A. The Standard Oil Company, I understand, are not, although I found one two weeks ago that was signed up and put in two weeks ago, since September 15th.

Q. Has the percentage of Bowser installations in your territory been as large this year as it was the year before? A. No, sir: smaller.

Q. But they have increased since September 15th?
318 A. Yes; because there are none going in by the oil companies, and I am selling them.

By Mr. Speer:

Q. It looks as if, at present, from what you say, that you have no competition? A. Except in the lubricating oil business, sir—lubricating tanks.

Q. There is no other company there selling tanks? A. Oh, they are selling tanks.

Q. They have no agents there? A. Oh, yes.

Q. And you are getting all the business, are you? A. Oh, no, sir.

Q. You are getting practically all, you think? A.

I was satisfied in the gasoline oil business since September 15.

Q. What you are getting, some other company is losing? A. This oil company business?

Q .The pump manufacturer is losing that, is he not? A. My firm was not; no, sir.

Q. I am not speaking of your firm. I say, all the sales that you make might have been made by some other company if you did not make them? A. I cannot speak for that. I am only speaking for myself.

Q. Somebody would make the sale? A. They 320
would not if the oil company was putting in tanks.

Q. The oil companies buy them from a manufacturer, do they not? A. Oh, yes.

Q. Every time an oil company puts in a tank, the oil company has bought it from the manufacturer of the tank, has it not? A. Yes; but it does not help the salesman.

Q. It helps the sale of the company whose tanks and pumps they are using, does it not? A. It might help the company, but you can take my position, as the White Horse Pike is sixty miles long, and there is one Bowser outfit on it, and about thirty-five Standard Oil. 321

Q. That is because the companies that have the equipments in there prefer to use some other tank and pump than yours? A. It might be.

Q. If you go to a filling station that has been put in by, say, the Texas Company, that has been buying and using your tanks and pumps, then you will find your tank and pump there, will you not? A. You will find the pump and tank there, yes.

Q. Any company that is handling yours, buying yours and putting them in, whenever you go to the filling station of that company, you will find your tank and pump, will you not? A. Of that one company, yes.

322 *P. H. Lemen, Cross*

Q. And those were bought direct from your company? A. Yes.

Q. Not through you? A. No, sir.

Q. And of course you lost that sale? A. Yes, sir.

Q. And that is the effect of the oil companies buying wholesale from the manufacturer—the effect of it is that the local salesman does not make that sale? A. Yes.

Q. But just as many pumps are sold? A. No, sir.

Q. Is it not a fact that there are more sold under this leasing system than there would be without it?
323 A. No, sir.

Q. Is it not a fact that more pumps are in use now than would be without this leasing system? A. There may be more of a certain make.

Q. I am speaking of the total. There are more pumps of every make in use now than there would be if this leasing system was not in force? A. No, sir; I do not believe so.

Q. You think it has not led to an increased sale of pumps? A. Not due to the leasing; no, sir.

Q. You think that without the leasing system there would be just as many pumps in use, and just as many filling stations as if there was no leasing system? A.
324 There would be as many curb stations; maybe not filling stations.

Q. There would be as many curb stations? A. Yes, sir.

Q. You heard the other witnesses say that this system of leasing was causing a great many curb stations to be established that otherwise would not be? A. That is in some districts, sir. The country districts, small grocery stores, and so on, are getting outfits that have no business for them.

Q. They are getting them, and people are getting gasoline through them, are they not? A. They are getting them.

325

Q. If this leasing system was not in force, those pumps and outfits would not be put in, would they? A. No.

Q. As a result, there are more of them being put in than would be put in if this leasing system was abandoned? A. There are more pumps gross going in, yes.

Q. Gross—that is what I mean. A. Yes.

Q. Then you admit that the other gentlemen were right? A. I am just speaking of my sales. I cannot speak of others.

326

Q. I am not talking about your sales. I am asking you about the use of pumps—whether or not this leasing system has not caused more filling stations and more pumps and outfits to be put into use than would be if it were abandoned? A. That I could not say.

Q. You don't know? A. That I could not say.

Mr. Speer: That is all.

(Witness excused.)

Examiner McCorkle: We will adjourn at this point, until 10 o'clock tomorrow morning.

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Whereupon, at 5 o'clock P. M., an adjournment was taken until tomorrow, November 21, 1919, at 10 o'clock A. M.

New York, N. Y., November 21, 1919,
10 o'clock A. M.

Met pursuant to adjourment.

Appearances as before, also Gale L. Schekter (for Brown & Williams), Morris Building, Philadelphia, Pennsylvania, appearing for Atlantic Refining Company.

328 *C. M. Carpenter, Direct*

Examiner McCorkle: You may proceed, gentlemen.

Mr. Zechiel: I will call Mr. Carpenter.

C. M. CARPENTER was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. State your name and address, please. A. C. M. Carpenter, Brandon, Vermont.

329 Q. By whom are you employed? A. S. F. Bowser Oil Tank and Pump Company, Wayne, Indiana.

Q. What is the general territorial extent of your employment, geographically? A. At the present time the State of Vermont and the northern part of New Hampshire.

Q. How long have you been with that concern? A. Eleven years.

Q. How much of that time has been spent in your present geographical territory? A. At different periods, I should say it would extend over four years.

Q. What is the general line of work in which you are engaged? A. Soliciting orders for oil tanks and

330 pumps, systems for handling miscellaneous oils and gasolines.

Q. You heard Mr. Runyan testify as to the manner in which such orders are taken and the business conducted? A. I did.

Q. Do you conduct your business in the same way? A. As nearly as I can.

Q. In the course of your business, have you ever lost any business for your company because of the practice of certain oil companies leasing and loaning oil tanks and pumps under what we have generally talked about as trying conditions or agreements? A I, of course, could hardly say. I felt so.

Q. What were the circumstances? A. Do you mean in a general way? That is, leading up to the cause for my assuming that I lost the business as a result of that practice?

Q. Yes. A. I have a case where an ex-salesman just left the territory and referred a prospect to me. This was the city garage at Berlin, New Hampshire, last week, and he informed me that this concern wanted to purchase two or three large tanks, five gallon pump and wheel tanks, and several lubricating oil equipments. Naturally it looked like a very flattering prospect, and I went there; and when I arrived, I 332
found that a large storage tank, that is a thousand gallon tank, was already being installed at the location. I went to the office and saw Mr. Bisson, of the city garage, and he informed me that they had decided not to do anything about the tank and pump now; that they had made arrangements with the Standard Oil Company for everything. I said: "You have not made arrangements for the lubricating oil outfits, have you?" "Oh, yes, they are going to furnish those, too." So I went out to see what I could get for my trip, and I found that they were not furnishing dry cleaning outfits, so I got a small order for dry cleaning up there. Other than that I had abso- 333
lutely nothing for the result of my trip.

Q. Did Mr. Bisson say under what terms and conditions the Standard Oil Company were furnishing them? A. Yes; they furnished them gratuitously.

Q. Has that experience been a common experience in your territory? A. At times. I had one at my home town. Do you wish me to explain?

Q. I do not care for each one in detail. I am more particularly interested in knowing how frequently that thing happened in your territory. A. In that particular territory it is happening almost every day, in a business way; because there is only one oil company operating, there is very little competition in that sec-

tion. The Texas Oil Company are operating a little bit in Rutland, Vermont, and also in Burlington, and the Gulf people have, until the war, operated in a small way up there; but the major part of the business interference is, of course, from the one company. It had entire control of the oil business. Of course our gasoline storage tank and pump business is absolutely good for nothing up there. If they now furnish lubricating oil outfits, it is discouraging for a salesman to try to get a living where the company restricts you to the Bowser line only. If we could carry side lines, of
335 course, it would give us a means of livelihood.

Q. What pump and tank was installed, or is installed, as a general practice, by the Standard Oil Company in that territory? A. The Gilbert & Barker.

Q. Have they ever installed any other pump to your knowledge? A. Not the Standard Oil Company.

Q. What per cent of the installations are G. & B. pumps in your territory? A. Ninety-five per cent in my territory.

Q. About ninety-five per cent? A. About ninety-five per cent. Prior to five years ago there was very little in that section I am speaking of.

Q. But at the present time the total per cent of all
336 installations of oil tanks and pumps used in the distribution and sale of gasoline is G. & B. equipment? A. Pardon me. I would not want to go on record as saying that in such a broad measure as that. By "at the present time" do you mean just the combination lighting post and pump, discharge pump?

Q. I am speaking of the entire equipment that is generally used in the sale and distribution of gasoline; that is, the pump and tank and other equipment in connection therewith. A. I do not think I am very far from the estimate in that particular territory, now.

Q. About ninety-five per cent is G. & B. equipment? A. I should think I would rather say eighty per cent, because there are certain sections where the Texas

people are operating some. I believe that I have seen perhaps half a dozen pumps furnished by the Texas Company within the last year.

Q. Do you know what pump was furnished by the Texas Company? A. They furnish the Bowser.

Q. Do you know what per cent of the total installations are under lease and loan contracts? A. It would be hard to say what the percentage of them is. I should say it was the total; of course I have no way of getting the accurate figures on that, but only from what it appears in one case with another.

Q. Do you know whether or not the G. & B. pump 338
was at times sold by the Standard Oil Company to the various customers? A. It used to be, before this leasing proposition went into effect.

Q. At the present time, if you know, what is the practice? A. There are very few cases where I have heard of their selling them.

Q. Would you say, then, that the majority of the installations of G. & B. pumps are under lease and loan contracts, for a nominal consideration? A. At the present time, yes, sir.

Q. In your experience in that territory, do the retailers of gasoline have installed more than one such oil tank and pump equipment in the same locality? A. 339
In very few cases.

Q. You would say that by far the majority of instances are those where there is but one installation? A. There is but one installation.

Q. To whom do you sell what equipments you do sell; to the concerns who have the largest output or gallonage, the medium or the smallest outfit, if there is any difference? A. We sell them to every one that we can, that is handling liquids of that character that we manufacture devices for; to grocery stores, hardware stores, garages, small factories and large factories, dry cleaners, drug stores. We have a specific line, of course.

340 *C. M. Carpenter, Cross*

Q. Do you sell the curbstone pump to the grocery stores and drug stores? A. If we can get there first.

Q. I mean whether or not it is a fact that you do sell them. Do you ever make actual sales to that class of trade? A. Yes; when we can develop them; we try to secure the order on the first trip. Of course there is pretty keen competition, and you have to get your business and get away.

Mr. Zechiel: That is all.

341 *CROSS-EXAMINATION by Mr. Speer:*

Q. You have sold pumps for the distributing of gasoline in your territory in the last four or five years, have you not? A. Yes, sir.

Q. Is it not a fact that your sales during the last four or five years have compared favorably with your sales before that time? A. Not in the gasoline line.

Q. In other lines? A. Very materially increased.

Q. So that your business, as a matter of fact, in the sale of pumps has increased in your territory? A. I should not say so. I should say that in that particular territory it had materially fallen off in that period. You say four or five years?

342 Q. Yes. A. I should say it had not been—well, I think I could show records where it had not been over sixty per cent in that period; because, prior to that the installation of free equipment was not practiced at all, by any of the so-called oil companies.

Q. All these pumps that are installed by the oil companies, are, of course, purchased from some manufacturer? A. Of course in that territory it is just one pump.

Q. That is a fact—all the pumps that are installed in your territory are purchased by the oil companies from some manufacturer? A. Why, certainly. They are manufactured by an oil tank or pump company.

Q. So that the loaning of these pumps is merely the disposition which the company makes of them after it has bought and paid for them? A. Pardon me, but I do not seem to just get the point of your question there. Do I understand you that the pumps are purchased from the manufacturer?

Q. Yes. A. Yes.

Q. So that the loaning of the pump is merely the disposition which the oil company makes of it after it has bought it? A. I think that you are trying to lead me away from the spirit of this thing in that question.

Q. Well, you can answer my question and then you 344
can explain it if you wish. A. As I understand it, the Standard Oil Company do not buy these pumps. They manufacture them and put them out.

Q. The Standard Oil Company of New York? A. The Standard Oil Company—the Gilbert & Barker people, owned by the Standard Oil people, manufacture these pumps, do they not, and put them out?

Q. Do you know anything about the ownership of the Gilbert & Barker Company? A. Only as I have been told.

Q. But, as a matter of fact, there is a company known as the Gilbert & Barker Company, which manufactures pumps? You know that? A. Yes. 345

Q. And that is the pump which the Standard Oil Company of New York is at the present time purchasing and using in its business? A. Yes; as I understand it.

Q. Now, the real objection— A. I thought you were conveying the idea that they bought Bowser pumps.

Q. Oh, no. Then, is it not a fact that your real objection is that they do not buy a proper proportion of their pumps from your company? A. They do not buy any from my company.

Q. If they did, then you would be satisfied? A. Not at all; because I would not sell them, you under-

stand. I am afraid you are losing sight of the salesman's standpoint.

Q. So long as they are loaned, you do not make the sale as a salesman? A. No; we get no revenue.

Q. But if they were using your pumps, your company would make the sale of the pumps? A. I am not worried about my company so much as I am about my family.

Q. Yes. Now, I get your point. Then your complaint is not that your company is being injured in its business, but your complaint is that your business as a
347 salesman is being interfered with by this loaning of pumps? A. Jointly with my firm.

Q. As a matter of fact, your company, the Bowser Company, does sell pumps direct to the large oil companies that are also loaning and placing them? A. Pardon me, but does that apply to my territory?

Q. Well, we will see about that. They are doing it? They are selling their pumps to other companies that are leasing and loaning pumps in other localities? A. That does not interest me, of course.

Q. But, I am speaking, now, of the effect upon your company. That is a fact, is it not? A. I do not know; that is for them to worry about, not for me.

348 Q. I am not talking about who is worrying about it, but I want to get in the record the fact about it. The fact is that the Bowser Company is selling its pumps to the Texas Company and other companies that are engaged in the loaning and leasing business? A. I wish they were not.

Q. Well, isn't it a fact that they are? A. I understand that they are; but, as I say, this matter in my territory is more vital to me and my family.

Q. Certainly. A. Than anywhere else.

Q. Certainly. A. And if I am to get any revenue out of this, I must either sell these pumps or leave the territory.

Q. Yes. A. Or sell something that they are not giving away.

Q. Then the trouble is, Mr. Carpenter, that this is interfering with your local sales business? A. Very materially.

Q. But so far as your company is concerned, it is selling to other oil companies, not through agents but to companies that lease and loan pumps? A. Well, yes, that are obliged to get them to meet the competition; and they have got to have them somewhere, and they do not buy them of the Gilbert & Barker people, so they have to have some kind of devices to go up 350 against this competition with.

Q. The Texas Company, you say, has put in at least fifteen pumps? A. I have been thinking, since then, and as I look over the territory I cannot seem to call to mind enough to make it fifteen; still, it may be. I would not want to be on record as giving it exactly.

Q. No; the exact number is not material. A. But it is very small compared with other sections. I will put it that way. It is very limited.

Q. The number which they have placed in this territory is very small as compared with the number which they have placed in other sections? A. I presume, from what I hear here, they must be operating 351 more than they are in my territory.

Q. But nevertheless, they have placed a few of the Bowser pumps in your territory? A. Yes; a few.

Q. And they have loaned and leased them to the operator? A. Yes, sir.

Q. And you have not made those sales? A. Naturally not.

Q. Those sales were made direct by your company to the Texas Company? A. I suppose so.

Q. And you do not get any commission on that? A. Very small recognition.

Q. And you are complaining as much against that practice, as affecting your business, as against the other

352 *C. M. Carpenter, Cross*

companies? A. Yes; from the fact that the influence is so bad. You understand that when a man can put in a pump in a territory that is, to all appearances, the very same thing as I am selling, it influences the subsequent purchaser; and of course he says: "They gave a pump to so and so. Isn't that your pump?" And you can see how damaging that would be to me.

Q. Isn't that true, Mr. Carpenter, of every business, where the manufacturer takes his goods direct to the ultimate consumer? Does not that interfere with the local salesman who may be engaged in selling
353 these goods in that same locality? A. No, sir, it is not. That is an entirely different proposition. If a tire man should go into an automobile accessory store and offer to give a man five or six tires, if he would stock their tires, it would be perfectly absurd. There would be no way for the manufacturer of tires, indirectly or directly, deriving any particular revenue as a result of that gift.

Q. Let us illustrate it. Suppose there was a firm in a town engaged in selling tires of some manufacturer on a commission basis; and suppose that some one who needed tires in that town, instead of buying from the commission man who was there locally, would send in
354 an order to the manufacturer and buy, say, a dozen tires; would not that interfere, to that extent, with the sales of the local commission man? A. Not to that extent.

Q. Would he not lose those sales? A. That would be fair competition.

Q. Would he not lose those sales? A. If he would lose those sales it would be a matter of personal equation in that case.

Q. Would he not make complaint, probably? A. Not if he was a first-class salesman. He would be a good loser.

Q. But the point I wish to make is this: That when

the manufacturer brings his product and sells it directly like that to the ultimate consumer, it takes that amount of business away from the local salesman, does it not? A. Yes; but it is fair competition.

Q. I am not talking about whether it is a fair competition. I am simply asking you if that is not a fact. A. Of course we know it is a fact, that way—if he does not get the business, the other fellow does.

Q. And in that way, when your company has sold, say, ten or fifteen pumps in your territory direct to the oil company and not through you, it is taking that many sales away from you, is it not? A. It is taking 356 more than that.

Q. Well, it has taken that many, at least, has it not? A. Yes, it has taken that many, at least.

Q. And, to that extent, it is taking, as you say, your business away from you? A. Yes; but I am thinking about the influence that those things have with the next one that I might sell, that was not quite as stiff on that proposition.

Q. Of course the other company selling a similar pump there, that takes your business away, too? A. I am not worried about him at all.

Q. Is that a thickly settled territory that you operate in, or is it rather sparsely settled? A. I believe 357 that, now, I would be safe in saying that I was looking after four hundred thousand people.

Q. It covers considerable territory, however, does it not? A. Yes.

Q. Have you any large cities? A. The largest one, I think, is about 22,000.

Q. Does the Texas Company operate in there? A. Not at all. They have a small equipment at Burlington, Vermont, and they have an agent, not a regular station, at Rutland, Vermont.

Q. Outside of that one city, the most of your territory is sparsely populated? A. Yes.

358 *C. M. Carpenter, Cross*

Q. And the Standard Oil Company of New York has gone in there and developed the business? A. It always has been there.

Q. And in order to accommodate the public, it has been putting in these pump filling stations as we call them? A. That sounds as though the poor public was thought of.

Q. I don't care what you are thinking about. It is a fact that they have done that, is it not? A. Yes; wherever they could.

Q. Of course their purpose in putting their filling
359 stations in is to sell gasoline, is it not? A. Naturally.

Q. They are establishing those filling stations at a great many places where there is very little population? A. Not filling stations.

Q. What do you call a filling station? A. Discharge station. They serve the gasoline from a predetermined measuring pump.

Q. I have not heard the word "discharge station" used before. Of course we can give these things any name we want to. What I refer to is the establishing or installing of a tank and pump for the distribution of gasoline. A. I think you mean the curbstone pump.

Q. You call it a curbstone pump? A. I don't. I
360 call it a combination lighting post and discharge station.

Q. That is what has been called here a curb pumping station, curb filling stations? A. Yes.

Q. Those are put in in little stores and places through the country, are they not? A. And large stores and garages.

Q. And large ones, too? A. And farm yards.

Q. And farm yards? A. Anywhere along the way where they think that there is a possibility of distributing any gasoline.

Q. That is the idea, and they have their trademark over these pumps so that the public will know

that it is their gasoline that is being furnished there? A. I do not think it is necessary. However, they put it on.

Q. Well, it is there? A. There is only one kind of gas sold up there, to any extent, so that it is not necessary to advertise it very extensively. It looks to me like a waste of money.

Q. The probabilities are that the people are satisfied with it or somebody else would come in and get the business away, would they not? A. If they had a chance to get in and get it. It is a pretty hard proposition to go up against. 362

Q. Is it not a pretty easy proposition to go in and put in a little curbstone pump? A. No, it is not.

Q. Is not that a much cheaper proposition than putting in an expensive service station? A. There would be no demand for service stations; they are too expensive, up in that country.

Q. There is not sufficient business? A. It would be too expensive.

Q. I say, the population there is too sparse to justify the establishment of these large service stations, is it not? A. It would not be if there was an opportunity to get in some competition, so that they could buy gasoline for less money and make it an ob- 363 ject for a man to go up there. I would not think the Texas people and the Gulf people would have much incentive to go into a territory where it was entirely one thing.

Q. Could they not put in service stations and offer their gasoline to the public? A. They could: but I should judge, from what I have seen and heard, that it would be very much more to their advantage to go elsewhere, where the conditions were better.

Q. Where they had a better chance to get business? A. Naturally. Wouldn't you think so?

Q. As a matter of fact, there is a large demand for gasoline in this country now, so that there is no

364 *C. M. Carpenter, Cross*

trouble in selling all the oil that you have got, is there?

Mr. Burdeau: I want to call attention to the fact that this is far beyond the range of any direct-examination bearing on the particular pump question. Counsel is probably making this witness his own.

Mr. Speer: That is probably true.

Examiner McCorkle: Keep in view what we are after and confine it to that as much as possible.

365

By Mr. Speer:

Q. Is it not a fact that there is more competition developing now in that territory than there has been in the past? A. It would be pretty hard to say. Of course, I don't know. The Gulf used to come up there a little but now I have not heard of their being around but very little. There has been a man over there but I have not heard of his doing any business.

Q. But the Texas Company is more active, and is beginning to develop that territory also? A. In Burlington, as I say. How much they are doing I could

366 not say. They are not, of course, putting out any pumps that I know of just at the present time, or, in fact, giving me very much assistance; all that they can; I am getting from the different oil companies all the prospects that I can, and getting all the oil for them. Where they give me a prospect for a pump, I give them the oil, and that is a practice that I make, to try to keep as pleasant relations as possible, because we ought to be very helpful to each other. That is the way we are trying to operate.

Q. And I believe you stated these ten or fifteen pumps which they have put in and loaned, and the

sale of which you did not get, had been put in during the last year? A. Oh, no.

Q. How long since they have been working there? A. I should think this would be over a period of—in fact two of them that I know of have been there all of five years, I think. It is pretty hard for me to tell where those others are. There are very few of them.

Q. Their business is increasing, however; they are developing there and doing more business than they have done before? A. I could not answer that.

Q. They are in Burlington, at least? A. I could 368
not answer that. I am not sufficiently familiar with it. There is not manifested enough for me to make an estimate from, I should not say.

Mr. Speer: That is all.

(Witness excused.)

F. C. SCHUSTER, was thereupon called as a witness and having been duly sworn, testified as follows:

Direct-examination by Mr. Burdeau: 369

Q. State your name and address, please? A. F. C. Schuster, 55 Imley Street, Hartford, Connecticut.

Q. And your business? A. Salesman.

Q. For what company? A. S. F. Bowser Company.

Q. What territory do you cover? A. Hartford and Litchfield County.

Q. With headquarters where? A. Hartford.

Q. You sell the pumps that have been described by other witnesses here? A. I do, when I can.

Q. Have you experienced any competition in your

business from the giving or leasing of pumps and tanks for a nominal consideration? A. I have.

Q. About how many instances of that kind have come under your observation in your territory? A. As to number?

Q. Yes. A. I would say, roughly, ninety per cent at the present time.

Q. Could you specify, or enumerate, three or four instances of that kind? A. Pine Meadow—Caffyn and Aspinwall, Pine Meadow. We received an inquiry from them late in the spring or early summer
371 that they were interested in an underground gasoline tank. I called on them and talked the situation over, and went outside with them and picked out a location which I thought would be very suitable for their pump; and the man owning the property happened to be out of town, and the young man, just starting in business, did not know the landlord would object to a gasoline pump. So I came back in a couple of days, and found that Mr. Chapin, the land owner, was sick in bed, so it was postponed for another day or two. I dropped in the following week and found out that they had made arrangements with the oil company for a lease proposition.

372 Q. What oil company was that? A. The Standard Oil Company.

Q. Do you know what pump was furnished under that lease agreement? A. The Gilbert & Barker.

Q. Do you know of other instances of that kind where a pump had been furnished by the Standard Oil Company? A. Yes.

Q. Without going into the details of the transaction, just give the names of two or three others? A. Bartle Brothers, of Falls Village, Connecticut. I made two or three calls there, and at my final call I found that they had signed up with the oil company for a leased proposition.

Q. Do you recall any other? A. The Barrett Hotel garage, Adams, Massachusetts. That territory happened to be open, and I made four or five calls there, and Mr. Barrett intended to lease the garage. I talked with the son, and finally talked with his father, after making three or four trips; and they signed up a lease.

Q. How long have you found that practice to be going on? A. Since 1915.

Mr. Burdeau: That is all.

CROSS-EXAMINATION by Mr. Speer: 374

Q. How much territory did I understand you cover? A. I cover Hartford and Litchfield County, Connecticut.

Q. This last place you mentioned was in Massachusetts? A. That was open territory, and I happened to be sent up there; it was territory that was vacated.

Q. That was far away from your own territory? A. Not very far; thirty or forty miles.

Q. You only mentioned three instances where you think you lost a sale by the parties deciding to lease a pump. Is that all you can mention? A. I did not 375 bring any records here with me. I suppose I might dig up a few more.

Q. And this leasing business has been going on since 1915? A. To my experience, yes, sir.

Q. Is it not a fact, Mr. Schuster, that your business, during this time, in this territory, in the sale of pumps, has increased? A. What do you mean by the sale of pumps—gasoline pumps?

Q. All kinds of pumps? A. For the discharge of gasoline?

Q. I am asking you, first, about the sale of all kinds of pumps that you are handling. Your business, as a

salesman, has increased, has it not? A. I cannot say that it has.

Q. You are at least doing as much business as you were before? A. I do not believe I am.

Q. You do not think you are? A. No.

Q. Would you not know whether your business has been increasing or diminishing in the last four or five years? A. I think it has been increasing up to the past year. The past year I think it has fallen off.

Q. Do you sell tanks for the storage of gasoline
377 separate from the pump? A. Occasionally.

Q. As I understand, the complete equipment requires a tank and then a self measuring device and a pump connected with it? A. Yes.

Q. You sell a tank separately to anyone who wishes to purchase, do you not? A. Occasionally, yes.

Q. Is it not a fact that you have sold quite a few tanks in your district separately from the pump? A. Very few.

Q. And in these cases the parties preferred to use another make of pump, but did take your tank? A. I would not say that.

Q. Well, they did take and use another kind of
378 pump? A. Every sale I have made of a separate tank, they have happened to have a Bowser tank and wanted a larger storage. That has been my experience.

Q. You never sold one to anybody who uses a different make of pump than yours? A. I do, yes.

Q. Then you have sold, in your territory, tanks to persons who were using another make of pump? A. I cannot recall that I have; but I would.

Q. Are any other companies operating in your territory in the sale of gasoline besides the Standard Oil Company of New York? A. The Gulf Refining and the Texas Company.

Q. Are they competing pretty extensively? A. I believe so.

Q. And are they not getting their share of the business? A. I do not know as to that.

Q. They are also leasing and loaning these tanks and pumps to those who will operate them and sell their gasoline? A. I believe so.

Q. Do either of those companies buy and use the Bowser pump which you handle? A. The Texas Company buys the Bowser pumps. The Gulf Company have a few.

Q. Does the Texas Company buy all the pumps which it uses in its territory from your company? A. I do not know as to that. 380

Q. So far as you know, is it not a fact that all the pumps which it puts in there are Bowser pumps? A. I am afraid you will have to go to Fort Wayne to get that information.

Q. You have seen their pumps there in your territory, have you not? A. I recognize a Bowser pump when I see it, of course. I do not know what kind of a tank is underground.

Q. The tank, of course, is buried? A. Yes.

Q. But is it not a fact that all the pumps which you have seen of the Texas Company have been the Bowser pump? A. Yes.

Q. Have you any idea how many pumps they have 381 put in in your territory during the last four or five years? A. No; I have only been in this territory since last February.

Q. Have you any idea what they have put in there since you have been there, since last February? A. I have not got the number.

Q. They are putting them in all the time, however? A. I do not know of any that have been put in during the last two months.

Q. Prior to that there were some put in that you know of? A. Yes.

Q. Those pumps were not purchased through you? A. No.

Q. Those pumps are purchased direct from your company at its manufacturing plant and shipped in to the Texas Company, and installed by them? A. Yes.

Q. And you do not get any commission on those sales? A. I get a small commission on them.

Q. But not to amount to much? A. Not a great deal, no.

Q. Do you engage in the sale of any other product or manufactured article than the Bowser pump? A. No, sir.

383 Q. You confine yourself to the sale of their pump and tank entirely? A. Exclusively.

(Witness excused.)

G. A. WILSON was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct-examination by Mr. Burdeau:

Q. State your name and address, please. A. C. A. Wilson, 452 Broadway, Albany, New York.

Q. What is your business? A. Sales representative
384 of the Bowser Company.

Q. How long have you been such? A. Intermittently for a period of ten years.

Q. What is your present territory? A. Generally speaking, it covers New York State east of Utica.

Q. Is your headquarters Albany? A. Exclusive of the immediate metropolitan district around here.

Q. And is your headquarters at Albany? A. Yes, sir.

Q. Mr. Wilson, are you familiar with the practice on the part of certain oil companies of loaning or giving oil pumps and tanks? A. Yes, sir.

Q. Have you, in your business, encountered cases

where that has taken place? A. Innumerable.

Q. And have you lost any customers by reason of that practice? A. Considerable.

Q. Can you just enumerate, without going into detail, but merely giving the name of instances of that kind? A. F. S. Burns, Ilion, New York; Frank Morgan, Middletown; Andrew S. Hamm, Saratoga Springs; Keyser & Embree, Schenectady; J. D. King, Poughkeepsie.

Q. Is that a complete list of all that you know, or just names picked at random? A. No, I should say not; just picked out decidedly at random. 386

Q. Did you personally visit each one of the people whose names you have given? A. Yes, sir.

Q. And had they installed a pump? A. Not the first time I called.

Q. They had not at that time? A. No, sir.

Q. They were prospects, or possible customers of yours? A. In most cases I developed them as prospects. That is a point that has not been brought out. I interested them in the handling of gasoline.

Q. And had negotiated with them for the sale of one of the Bowser pumps? A. Yes, sir.

Q. And in each case the sale fell through because they obtained a pump under lease agreement from an 387 oil company? A. Well, that "lease agreement" is so broad—

Q. Never mind characterising it. A. I could not answer it in the affirmative, because the last case I had was John D. King, at Poughkeepsie, which transaction has taken place within the past two weeks, and he has not signed a blooming thing, and has about a thousand dollars' worth of goods.

Q. He has not signed an instrument? A. No, sir.

Q. But he has the equipment? A. Yes.

Q. From what company did he obtain it, do you know? A. From the Standard Oil Company of New York.

388 *G. A. Wilson, Cross*

Q. In the other cases you have enumerated, what companies furnished the equipment in those cases? A. The Standard Oil Company.

Q. How long, to your knowledge, has this practice gone on in the territory covered by you? A. I have only been in this territory that I have specified for maybe a year and a half.

Q. And during that year and a half has this practice been pretty constant? A. Decidedly. I think it is the hottest bed in the country. Everybody thinks his is the same. But Albany is the distributing point for the
389 Standard Oil Company and naturally that has its effect.

Q. Is there any other company in that territory that gives away or leases for a nominal consideration tanks and equipment? A. There are those who would like to, and a couple who do a little.

Q. Mention any other company who does a little? A. The Texas Company and the Sinclair Refining Company.

Mr. Burdeau: I think that is all.

CROSS-EXAMINATION by Mr. Speer:

390 Q. Are there any other companies in addition to the Texas and Sinclair that are also operating in your district? A. Not that I know of, Mr. Speer.

Q. Is not the Gulf operating there? A. I know that they are operating in this district that I have outlined, but I have not observed personally any instances of any action of this character. I know that it exists, but I have not personally investigated any of the cases.

Q. But the Gulf do business? Do they sell gasoline in that territory? A. They evidently do, yes.

Q. How do they sell it? A. I don't know.

Q. Have they any service stations that you know of? A. What do you mean by service stations?

Q. Buildings in the town? A. You mean drive-in stations?

Q. Yes; where you drive in? A. Not to my knowledge.

Q. Operated by the company itself? A. Not to my knowledge. They may have.

Q. That method of selling is in vogue in many places? A. Yes.

Q. Do not all of these companies have such stations? A. I do not believe that the Texas, and I know 392
that the Standard has just recently one that I know of.

Q. Has the Sinclair any such stations? A. No, sir; not to my knowledge.

Q. Does the Tidewater sell gasoline in your territory—the Tidewater Oil Company? A. They operate through local agents.

Q. That is, instead of loaning an equipment to somebody who operates it himself, they establish an agent? A. They merely sell at wholesale, as I understand it.

Q. To their agent? A. I do not know whether they consider the man as their agent or not. 393

Q. Do they have a sign up that it is their gasoline? A. No, sir.

Q. Then they are not attempting to sell under any trade-mark or brand, so far as you know, in your district? A. They are attempting to sell the wholesaler on the basis of their high quality gasoline.

Q. But does he sell it, then, as theirs? A. No, sir; he is buying in the open market. He is not always using theirs.

Q. The Texas Company is leasing and loaning these pumps quite freely in your territory, is it not? A. No, sir; they would like to, but they are not.

394 *G. A. Wilson, Cross*

Q. Why not? A. They cannot stand the gaff. The other man is on the job first.

Q. The competition is too hot for them is it? A. The Standard Oil competition, yes.

Q. There is no law against their putting up filling stations, if they want to, is there? A. It depends on where they want to put them up. There is a law against most of them; that is, a real filling station, carload storage.

Q. I do not understand? A. A real filling station is where carload storage is provided. Most local
395 municipalities have laws prohibiting large storage.

Q. Then all companies are prevented from having that kind of station? A. Yes.

Q. So that that applies to the Standard Oil Company of New York as well as to the Texas? A. Yes, sir.

Q. How do the Texas operate? A. I do not know anything about the Texas business.

Q. I understood you to say that they did sell gasoline in your territory? A. Yes, they do.

Q. How do they sell it? A. The same as the Standard does.

Q. They loan these pumps and tanks? A. Yes, sir.
396 Q. That is what I was getting at? A. I did not get your point.

Q. Whose pump and tank do they handle? A. The Bowser Company's, and the Wayne Company's.

Q. They have been quite active, and have been putting in quite a lot of pumps in the last few years have they not? A. No; not in the territory I have reference to. I will modify that statement by this: They have been quite active, but they have not been successful in doing it in the territory I cover.

Q. But there is quite a lively competition there? A. I really do not know. I do not see why they do not get more business than they do in my territory.

Q. They are putting in pumps where they think there is sufficient business to justify it, and competing, there, in your territory, for the sale of gasoline, are they not? A. Judging from some places that they put them in, I cannot personally feel that it is because they consider those points a profitable investment, which is on the same basis as the Standard Oil are putting them in.

Q. You think both companies are using bad judgment in creating more of those stations than necessary? A. Not bad judgment. It must be good judgment—I give the Standard Oil credit for using good 398
judgment.

Q. You think if the Texas does it, though, it is bad judgment? A. No.

Q. You think there are more of these filling stations being established— A. You mean the curb pumps?

Q. Yes; you think there are more of them being established than are needed for the business of the community? A. There are considerably more than are profitable, I know.

Q. But the result of that has been that more pumps have been sold by the manufacturers and installed than otherwise would be done in that territory? A. I don't know. I have no statistics as to the number, generally 399
speaking.

Q. These extra pumps which have been put in, more than are needed, have all been made by somebody, have they not? A. Yes.

Q. And they have been sold by the manufacturer to the oil companies? A. Presumably.

Q. And these Bowser pumps that the Texas Company has put in, as you say unnecessarily, have been manufactured— A. I did not say unnecessarily any more about those pumps than I did as to the others.

Q. Of course, but you say they are all more than necessary? A. No, sir.

400 *G. A. Wilson, Cross*

Q. That applies to some of the Texas, does it not? A. I think in my territory that the Texas have no unprofitable pumps, to the best of my knowledge.

Q. You don't know that any company has an unprofitable pump, do you? A. Absolutely I do—that is, in my opinion.

Q. In your opinion? A. Yes.

Q. In your opinion they are not selling enough through those pumps to justify maintaining them there? A. Yes.

Q. In that case, of course, the operator, if he had
401 to pay and install a pump, would not put one in, would he?

> Mr. Burdeau: I object to that, as too remote and uncertain. How can a witness testify as to what some one else might or would do? It is too speculative.
>
> Examiner McCorkle: That is not material either way.
>
> Mr. Speer: We have had a great deal of opinion evidence here which we objected to.

By Mr. Speer:

Q. Is it your opinion that many of these pumps that
402 have been leased and loaned would never have been installed if the operator had to buy them and install them himself? A. Some of them.

Q. Is it not your opinion that, on account of this leasing and loaning method, a great many more pumps have been installed in your territory than otherwise would have been installed? A. Speaking of the territory generally, no.

Q. Speaking of particular parts of it, then? In some parts of your territory that is true, is it not? A. In a certain block of the City of Albany that is true, and in the next block it is not.

Q. Do you not know, Mr. Wilson, that some com-

panies instead of leasing pumps to the operator, make him their agent, own the pump, and allow him a commission for selling their gasoline? A. I don't know.

Q. Is it done in your territory? A. I don't know.

Q. You don't know whether that is done or not? A. No.

Q. You say Mr. King, in Poughkeepsie, has a pump, and has not even signed a lease for it? A. No, sir; I did not say that. I said he had received equipment. He has only received his tanks, but his pumps are promised him, and supposedly on the way.

Q. He is to have them on the leasing system? A. I 404
don't know any more than what Mr. King told me. He has signed no contract.

Q. Not yet? A. He does not intend to, he told me.

Q. He has not got his equipment all put up, has he? A. No. He has the tanks on the ground.

Q. He may be compelled to sign something before being allowed to operate, may he not? A. That is your business. I don't know.

Q. For all you know, the lease may be on the way to him to sign? A. I hardly think so, because the district manager was up there to see him personally and wanted him to sign it, and he would not. 405

Q. And the equipment has not yet been installed? A. The tanks, he told me, were installed, yes.

Q. For all you know, he may buy that equipment yet? A. It will take a salesman to sell it to him.

Mr. Speer: That is all.

By Mr. Nesbitt:

Q. Will you be good enough to tell us the arrangement under which your service to the Bowser Company is conducted? That is, are you on salary or on a commission basis only? A. Both.

Q. And your office in Albany is maintained by the

406 *G. A. Wilson, Cross*

Bowser Company? A. Not my office. I am simply a salesman working out of there.

Q. The Bowser Company maintain an office there? A. Yes.

Q. And you use that for your own headquarters? A. Yes.

Q. Are you engaged in any other business? A. No.

Q. In case of sales of Bowser pumps that are made direct to oil companies to be installed in your territory, there is a commission paid to you, some commis-
407 sion, in addition to the salary which you regularly receive from the company? A. My position with the company is peculiar. To directly answer that statement, no. I receive no remuneration from oil company business.

Q. You have heard the testimony of other Bowser agents here? A. Yes.

Q. And your own relation to the company does not correspond to theirs? A. No, sir; except that my salary is based on my production of business in the territory, and if the Texas were operating, extensively, I imagine that, as a personal affair of mine, I could see that I profited thereby.

408 Q. That is, sales directly to the Texas Company for installation in your territory would be reflected in the remuneration which you receive? A. They would be.

Mr. Nesbitt: That is all.

Witness excused.

J. P. METZLER was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. State your name and address, please? A. J. P. Metzler, Geneva, New York.

Q. By whom are you employed? A. S. F. Bowser Company, Fort Wayne, Indiana.

Q. How long have you been with that company? A. Not quite a year.

Q. Prior to that time what had been your business? A. Traveling sales manager for a corporation out of 410
Chicago for ten years.

Q. Not a pump company? A. No.

Q. What is the territory over which you do business, geographically? A. From Erie County, Pennsylvania, to Onondaga County, Pennsylvania. That is between Auburn, including Auburn, to almost Buffalo, except Monroe County, in which Rochester is located.

Q. Do you do business up in the State of New York also? A. This is New York State I am speaking of.

Q. Oh, it is all in New York State? A. It is all in
New York State; eight counties in New York State. 411

Q. You heard Mr. Runyan testify yesterday? A. I did.

Q. As to the general method in which he does business for the Bowser Company in his territory? A. Yes, sir.

Q. Do you conduct your business in a similar manner? A. Yes.

Q. Your sales are made in very much the same way, and your orders are solicited, are they not? A. Yes, sir.

Q. In your territory, in your experience during the last year, have you lost any business because of the

practice of certain oil companies leasing and loaning oil tank and pump equipments for a nominal consideration? A. I have.

Q. State that more in detail, Mr. Metzler, whatever your experience has been along that line? A. Well, it was rather something that was surprising to me when I joined this company, as I had not any idea of brooking the interference—

Q. In order to save our record, and to save as much time as possible, let us just confine ourselves to the facts? A. There are very few oil companies ope-
413 rating in my territory with any degree of satisfaction, I might say. The only company that is installing pumps is the Standard Oil Company, aside from just a very few pumps during the year that have been installed in my territory by some minor oil companies.

Q. When you speak of the Standard Oil Company, you mean the New York corporation? A. The Standard Oil Company of New York.

Q. What other oil companies are doing business in your territory? A. That is really represented there, but not doing much business, the Warren Oil Company, Kendall Refining Company, Onondaga Oil Company, Standard Oil Company, the Weeks Oil Com-
414 pany, Fay C. Adams, or what is known as the Corn Planters Refining Company.

Q. Would you say that, so far as you know, none of the other oil companies that you have enumerated except the Standard New York corporation lease and loan such equipments? A. Well, yes, they are, but in such a minor way; there have been so few that it has not been worth taking notice of in my territory, of any other pumps being installed but the Gilbert & Barker.

Q. And the Gilbert & Barker pump is being installed and has been installed by the Standard Oil Company? A. Yes.

Q. Do you know whether or not the Standard Oil Company of New York in your territory has installed any other make of pump than the G. & B. pump? A. Not to my knowledge.

Q. What per cent or proportion of the installations in your territory are G. & B. pumps? A. From ninety-five to ninety-eight per cent, I believe.

Q. And the balance is what pumps that are installed? A. A few Bowsers and a few Rapid Dayton pumps, and a few of the Pennsylvania Specialty pumps, and a few Wayne pumps, a few of all, a very few. 416

Q. If you know, what proportion of the G. & B. installations have been installed under lease and loan contracts? A. According to the information that comes to me—

Q. If I may ask, that is your information that you get as traveling about over your territory? A. From the man that has the pump installed on his curb.

Q. Go ahead. A. I was trying to call to mind an instance where anyone has ever told me they have purchased the pump. I do not recall an instance in my territory where the pump has been purchased by the man who has it installed on the curb in front 417 of his place of business.

Q. Are you speaking with respect to all pumps, or merely the G. & B. pump? A. The G. & B. pump. Over in Cayuga County and a portion of Wayne, in the northeastern end, the Fay C. Adams is operating and has installed the Pennsylvania Specialty Company's pumps, and in some of the towns the Fay C. Adams is represented as strongly as the Standard Oil.

Q. Do you know whether the Adams Company installs their pumps under lease and loan agreements? A. They do.

Q. With respect to the per cent of installations of G. & B. pumps that are under lease contracts and those that are sold outright, you testified that you do not recall anyone having told you that he had purchased a G. & B. pump and had it installed. Do you recall anyone having told you that he had such an equipment installed under a lease and loan agreement? A. I do recall one instance where the man has told me—and a reputable man and I believe it—that he has purchased the outfit. That was just recently, though, not over two weeks ago, in a little town down near—
419 I cannot recall the name of the town, now, but down near Addison, New York, a milling company that had purchased an outfit. It is the only instance in my experience for the entire year that the outfit had been purchased by the man who had it installed on his curb.

Q. Now, with respect to those that have been leased and loaned, what have they said about it? A. I make it a special point—

Q. Just a moment. Let me settle this thing, to make it very clear. I want to know to what extent you are actually acquainted with the terms under which these pumps were put in, and I am distinguishing
420 those that you do not know about at all from those where you, from your experience, have reason to believe that they are put in under lease and loan agreement? A. The only information I have is what they tell me.

Q. That is just what I want to get at. What part of those installations of G. & B. pumps, so far as you know, are put in under loan or lease agreement? A. According to what they tell me, each and every dealer I called on, I do not know of one, but is put up under those conditions, or put on the curb under those conditions. I have not come against but one instance

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where the man owned his pump, that I can recall at this time.

Q. In your territory what has been your experience; do dealers in gasoline, who sell through curb pumps, have installed on the same premises more than one such equipment? A. In instances there is a pump inside the garage for service to the cars inside, and there is one pump on the curb—in instances.

Q. Would you say in few or many instances there are more than one such equipment? A. A few instances. In a few instances they have two pumps, one on the inside of the garage and one on the outside.

422

Q. If you know, where there is more than one installation, does the retailer deal in more than one company's gasoline at the same time? A. No, not in my territory. I have not an instance that I can call to mind.

CROSS-EXAMINATION by Mr. Speer:

Q. You mentioned a few small companies, as I understand, which you say operate in that territory and sell gasoline. Do they sell to the local dealers in quantity, or do they attempt to market their product direct to the consumer? A. There is one company that is marketing their product both through the curb pump, or through a curb pump in one city, and also have service stations in other cities in which you drive in, in my territory.

423

Q. And that company, that is operating curb pumps, and has service stations of its own is, in that way, reaching the ultimate consumer with its product? A. Yes.

Q. Is it selling it under a trade-mark? A. They have their name on their service station.

Q. What company is that? A. The Warren Oil Company.

424 Q. The other companies just sell to local dealers in quantity, and they distribute? A. They distribute; that is they distribute through their curb pump to the autos.

Q. And of course they can distribute it under any name they please, or without any name? A. Yes.

Q. The Standard Oil Company of New York has adopted the policy of establishing service stations and curb pumps so as to sell its product to the ultimate consumer? A. They have no service stations in my territory.

425 Q. They are using the curb pump system? A. They are using the curb pump system, yes.

Q. And deliver the oil there, and it is sold as theirs, under their trade-mark to the ultimate consumer? A. Yes, sir.

Q. The man who has an automobile and wants a supply drives up and gets it? A. Yes.

Q. The companies that are, like the Warren Company, reaching the ultimate consumer, are doing it through service stations and through curb pumps? A. There is only one instance where it is sold in my territory through a curb pump, and this man buys the oil outright, and the oil company is not interested in the

426 outfit that it is dispensed through. In other words, in no instances has the Warren Oil Company installed any outfit in which they are interested that I have known of, aside from their own stations that they are now opening up, except in an instance where I had worked up a prospect and had enticed him into believing that he should open up service statoins and drive-in stations, we will say, and I had him sold; and he was willing to place the order, in fact was anxious to sign the order but, owing to the fact I felt I might take undue advantage of him, until we had secured the proper locations, I did not take the order. The result is that, in calling upon the Warren Oil Com-

pany, that he was rather suggested to call on in reference to securing the gasoline—in calling on them repeated times at my expense, they finally switched him over and gave him an outfit, so he told me, and furnished him the tanks and furnished him the pumps, and he has the station, now, and I am still waiting for the order.

Q. That long speech was not in answer to my question. The Adams Company, as I understand you to say, is loaning and has loaned some? A. Has loaned some.

Q. Has it a brand under which it sells its gasoline? 428
A. I have purchased it at different places, but I do not know whether he has a name for it. I have not seen any.

Q. These curb filling stations that they have installed, do they use any name on them? A. No; I have not seen any name.

Q. You do not know of any? A. In my evidence I said it was the Corn Planters Refining Company, or Fay C. Adams Oil Company—I am not even familiar with what he calls his gas or whether it has a name.

Q. Is there a Sterling Oil Company operating out in your section? A. Not that I know of.

Q. Does the Pavania Oil Company operate in your 429
territory, the Warren Company? A. The Warren Oil Company is the one I was talking about.

Q. I thought there was a company in Warren operating under the name of the Pavania Oil Company? A. Not in my territory, that I know of.

Q. These companies that are operating now, the Warren Company and the Adams Company are quite active in the territory that they are occupying so far as competition is concerned? A. Well, as I say, there is only one pump in my territory.

Q. I am not talking about pumps. In the sale of gasoline? A. They are not very active.

430 *L. W. Cheney, Direct*

Q. Are they not more active than they were? A. You see, I have only been in the territory a year.

Q. Yes. A. I never hear of them, only when I come in the spot where they are doing business.

Q. Yes? A. The Warren Oil Company is represented only through one pump. Now, they are opening up, in the last two months, their own stations, or two stations in the City of Geneva. Further than that they are not represented.

Q. Instead of loaning the pump to the operator, if the company would make the operator his agent, and
431 instead of loaning the pump would own the pump, and have him operate it as their agent, under commision, that would have the same effect, so far as the sale of pumps is concerned, as if they loaned it, would it not? A. That I do not know.

Q. Well, here is John Jones, to whom a pump has been loaned and who is operating it and selling the gasoline of an oil company. That not being your pump, you did not get the sale of it. Suppose that, instead of loaning it to John Jones they had made John Jones their agent, and put in the same outfit. The effect would be the same, so far as your business is concerned, would it not? A. I presume so.

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Mr. Speer: That is all.

Witness excused.

L. W. CHENEY was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct-examination by Mr. Burdeau:

Q. State your name and address, please? A. L. W. Cheney, Floral Park, Long Island, New York.

Q. What is your business? A. I am salesman for S. F. Bowser & Company.

Q. What territory do you cover? A. Long Island, New York.

Q. How long have you been salesman for that company? A. Since 1911.

Q. How long have you been working Long Island? A. Since the 1st of February, 1919.

Q. During the time you have worked in that territory have you observed or encountered any instances where prospective customers had been furnished an equipment, oil tank and pump, by an oil company under a lease? A. Yes, sir. It is a daily occurrence. There are innumerable instances. 434

Q. Do you recall any particular instances of that kind? A. Yes, William L. Mantha, of Bayport, Long Island, wrote a letter to our company inquiring about our five-gallon pump. I made a special trip to see him and showed him our equipment and endeavored to persuade him to purchase it, but he said he wanted to investigate a little further. I called on him again in about ten days and he was not through, he said, with his investigating, and I called another week and he said that he had made arrangements with a large oil company to furnish him a five-gallon pump without charge.

Q. You say an oil company had? A. Yes. 435

Q. Did he specify the oil company? A. Yes, the Standard Oil Company furnished him a Gilbert & Barker five-gallon pump.

Q. You also called on the firm of Forman & Hutcheson, Hempstead, New York? A. Yes, in fact, I worked with them for about three weeks, or close on to a month, giving practically all my time and attention to them, in the endeavor to persuade them to purchase our equipment, which would have run around $1,000. They said they liked our equipment and would give me the order for it unless they were furnished full equipment by an oil company. During

436 *L. W. Cheney, Direct*

this time I practically did not make any other sales, and I had no income from my efforts, as they finally informed me that they were being furnished full equipment, a thousand-gallon tank and a five-gallon pump, with other equipment, from the Standard Oil Company of New York, the equipment being Gilbert & Barker.

Q. During the time that you have worked in that territory about how many cases of that kind would you say have come under your observation? A. I would say that all the public garage owners have
437 the equipment that is loaned and leased to them.

Q. I would like to get some approximate idea of the number. Would that mean a dozen or 50 or a hundred? Could you approximate the number of those cases that you know of yourself? A. Off-hand I would say approximately 100; I could not name them or give every name here from memory.

Q. That is not necessary. A. I would say approximately 100 outfits.

Q. One hundred cases in which the equipment has been installed by an oil company under a lease and loan agreement? A. Yes, sir.

Q. You also have competition from other pump
438 manufacturing companies, have you not? A. Yes, sir.

Q. But do they ever give away or lend pumps for a nominal consideration, do you know? A. I do not know how to answer that question.

Q. I will withdraw it. You have described certain cases in which equipment has been leased or loaned by oil companies. Now, do any of your competitors, pump manufacturing companies, do the same thing?

Mr. Speer: I object to that. I think it is irrelevant and immaterial. There is no charge against any pump companies.

439

Examiner McCorkle: I note the objection. Proceed to answer.

A. I would say it is a little difficult to answer that question.

By Mr. Burdeau:

Q. Who are your competitors in the territory that you sell? A. The Wayne Pump & Tank Company and the Gilbert & Barker Pump Company, to the extent that they do not solicit business directly to sell equipment.

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Q. You have answered my question. You have named your two competitors. Does the Wayne Company ever give away or lease for a nominal consideration any pumps manufactured by them?

Mr. Hayes: It seems to me that ought to be, if he knows.

Mr. Burdeau: Of course I am only asking what he knows.

A. Not to my knowledge.

By Mr. Burdeau:

Q. Do you know the method of distribution adopted by the Gilbert & Barker Company? A. Yes.

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Q. Will you give that? A. It is through the Standard Oil Company of New York.

Mr. Speer: I object to the question for the reason that the Gilbert & Barker Company is not a party to the action. What they are doing has no bearing on the issues.

Examiner McCorkle: The objection is noted. Proceed with the answer.

By Mr. Burdeau:

Q. Do you know? A. The Gilbert & Barker Pump & Tank Company, to the best of my knowledge,

do not sell their equipment in my territory, but it is placed in my territory through the Standard Oil Company of New York, leasing and loaning them to the operators.

Q. Have you ever heard of a salesman from the Gilbert & Barker Company soliciting any of the garage owners or other pump users in your territory? A. No, sir; not as a salesman to sell the goods direct.

Q. If you know, will you please state what make of pump is usually installed by the Standard Oil Com-
443 pany under these leasing and loaning agreements? A. The Gilbert & Barker pump exclusively.

Q. Do you believe that the practice that has been mentioned here, namely of leasing and loaning pumps has any effect on your business and the business of the Bowser Company? A. Absolutely. It has annulled or killed our entire public garage business so far as the gasoline equipment is concerned. It has affected the Bowser Company's business because the company which has furnished the garage owners' equipment has used another pump and tank company's equipment and it has been very discouraging to me, as a salesman and must be to all other Bowser sales-
444 men, because of the business lost; and this is demoralizing to the sales force, inasmuch as the salesman's income is curtailed, and the salesman consequently does not call on the public garage owner and give him the attention and secure other possible business which he would secure if it was possible for him to secure the business. Therefore, I think it is detrimental to the salesmen and to the Bowser Company that these equipments are leased and loaned to the public garage owners.

CROSS-EXAMINATION by Mr. Speer:

Q. What other companies besides the Standard Oil Company of New York lease and loan pumps and

equipment in your territory? A. The Tidewater Oil Company, the Gulf Refining Company, The Texas Oil Company, the Ohio Cities Gas Company.

Q. The Pure Oil Company? A. That is a division of the Ohio Cities Gas Company.

Q. Are they active in installing pumps at the present time? A. I imagine they are, as much as they possibly can be, but they certainly do not succeed very well because of the great number of the Standard Oil Company's equipments which are already in.

Q. But they are quite active now in competition, endeavoring to install their pumps where they can? 446
A. Yes, sir.

Q. And the competition in your territory now is quite keen, is it not, between these companies, each one trying to get the business? A. I cannot answer that question.

Q. What pump does the Tidewater Company usually install? A. I am not sure which one it is.

Q. Do they install any of yours? A. No, sir; that is, not to my knowledge, at the present time.

Q. What pump does the Gulf Company usually install? A. The Rapid Dayton.

Q. Where is it made? A. At Dayton, Ohio.

Q. What pump does The Texas Company usually 447
install in your territory? A. They have installed the S. F. Bowser Company's and also the Wayne Oil Tank & Pump Company's pumps.

Q. The Bowser Company is your company? A. Yes.

Q. What pump does the Ohio Cities usually install? A. The Wayne and the Bowser. There may be possibly some others installed, but I do not recall their names now.

Q. These Bowser pumps that are installed by The Texas and the Ohio Cities Company are bought by them direct from your manufactory, are they not? A. Yes.

448 *L. W. Cheney, Cross*

Q. And they are leased and loaned to the operators in the same way that the Standard Oil Company of New York is leasing and loaning the pumps which it installs? A. So far as I know. I do not know the details.

Q. Well, your opinion is that they are operating in the same way? A. In the same line; yes, sir.

Q. So that your Bowser pumps, in so far as they are being installed by The Texas Company and the Ohio Cities Company, are being leased and loaned in your territory the same as the Gilbert & Barker
449 pumps? A. Yes, sir.

Q. Do you get any commission on those pumps which are bought from your company by The Texas Company and the Ohio Cities Company? A. A small commission.

Q. Not enough to be of much value? A. It would be much more to my interest if the outfit were sold direct instead of through the company.

Q. In so far as those pumps are sold directly by the company and installed, they positively take away from you, in so far as the Bowser Company's pumps are sold in that way to the companies and installed, they take away from you directly that amount of
450 business, do they not? A. Yes, sir.

Q. And that is being done by your own company? A. Yes, sir; because they are forced to, to meet the competition. It is not because they are glad to do it, or want to do it.

Q. They are in the business of manufacturing and selling pumps, are they not? A. Yes.

Q. And they get the same price for them whether they sell them to an oil company or— A. No, I don't think so. I imagine they do not. They must prefer to sell them the way they have sold them until they began this lease and loan proposition, which forced them to furnish pumps where they could to oil companies that do put them in in that way.

Q. They have naturally followed the new trend in business development and are selling their pumps to the people who want to buy them? A. The people who are forced to buy them.

Q. Do you say The Texas Company are forced to buy them? A. They are forced to buy some pump and we have the good fortune, as long as they are forced to lease and loan pumps, to furnish some of our pumps.

Q. Do you understand The Texas Company is claiming that it is forced to do this? A. No, sir.

Q. Now, if these companies who are leasing and 452
loaning pumps in this way—if, instead of adopting that method of doing business, they made these operators their agents, and allowed them a commission and installed the pumps where they now are, that would not make any difference so far as your business is concerned, would it? A. Do you mean that the people would buy the pumps direct, then?

Q. Yes; the company, instead of leasing a pump to a man, would go and make an arrangement with that operator to be their agent and to handle their oil and take care of their pump, and pay him a salary or a commission and put in the pump? A. Who would own the pump? 453

Q. The company. A. The oil company?

Q. The oil company. That would not help you at all, would it? What do you say? A. Let me think a moment.

Q. You would not get the sale if they adopted that method, would you, any more than you do now? A. No; it would not be as good for me.

Q. It would not be as good? A. No.

Q. Because then you would have no hope whatever that the pump would be taken out and you might get a chance to put one of yours in? A. Yes, sir.

(Witness excused.)

454 *H. W. Brown, Direct*

H. W. BROWN was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct-examination by Mr. Burdeau:

Q. State your name and address, please. A. H. W. Brown, 452 Broadway, Albany, N. Y.

Q. What is your business? A. I am district sales manager for S. F. Bowser & Company.

Q. Your district embraces what territory? A. My district embraces all of the New England States except Boston, and the four eastern counties of Massa-
455 chusetts, and the State of Rhode Island, and the State of New York, except the three point counties surrounding New York City, and the central part of Pennsylvania.

Q. How many salesmen work under your supervision? A. At the present time about 29.

Q. You are the head of the selling organization of the Bowser Company in the territory you have just mentioned? A. I am.

Q. You receive reports from your salesmen from time to time? A. I do.

Q. Have you had brought to your attention the practice of oil companies leasing and loaning for a
456 nominal consideration, pump and oil tank equipment? A. I have.

Q. Do you believe that has any effect on the business of the Bowser Company? A. I do.

Q. What effect do you think it has?

Mr. Speer: I object to asking the witness as to his belief.

Mr. Burdeau: I withdraw the question.

By Mr. Burdeau:

Q. Can you state whether or not that has had an effect on the business of the Bowser Company? A. I can.

Q. Will you please state what effect that practice has had on your business? And by "your business," I mean the business of the Bowser Company. A. It has had a demoralizing effect, first, upon the sales organization, and it has had a demoralizing effect upon the business in general, because of the reduced production in the particular line of equipment, namely, the gasoline tanks and pumps, which we have built a factory and organized a production department to produce.

Q. Your plan of distribution of your product is what? A. Our plan of distribution is by sales direct 458
from the company through salesmen to the consumer, to the user.

Q. The individual consumer? A. Yes, sir.

Q. What competitors have you in the territory that you have mentioned? A. Well, we have various tank and pump manufacturers as competitors. Do you wish me to name them?

Q. You might name a few. A. We have the Wayne Oil & Tank & Pump Company; we have the Milwaukee Tank & Pump Company; the Tokheim Tank & Pump Company.

Q. Do you know what their method of distribution is? A. Their method of distribution, to the best 459
of my knowledge, is very similar to ours—direct from the manufacturer to the consumer, or the user.

Q. Does each of those companies maintain a force of sales agents and salesmen? A. They do.

Q. In your territory? A. Yes.

Q. Can you state whether the Gilbert & Barker Company competes with the Bowser Company in the territory that you have mentioned? A. The Gilbert & Barker Company do not.

Q. Are any of the pumps made by the Gilbert & Barker Company distributed in the territory you have mentioned? A. They are.

460 *H. W. Brown, Direct*

Q. Do you know how they are distributed? A. Through the Standard Oil Company.

Q. Under the lease and loan agreements that have been mentioned here? A. Yes, sir.

Q. Have you any record of the number of cases? A. Not at hand.

Q. When you said, a moment ago, that this practice had a demoralizing effect on your salesmen, could you be more specific in stating what you meant by "demoralizing effect"? A. Yes.

Q. Please do so. A. Our sales policy has been,
461 as I stated, to sell directly through the salesmen to the user. Our salesmen work on a commission basis. They finance themselves. They are given a territory in which they are protected under contract. They have been so discouraged by so many tanks and pumps having been leased or given away, after they have, through their own soliciting efforts, created a demand for establishing the handling of gasoline in connection with the business, garage or otherwise, as the case may be; after they have established that demand or created a desire to do that thing, the Standard Oil Company have interceded and given them, or leased them, an equipment to do the same
462 thing with, naturally defeating the sale that the salesman had worked up, to such an extent that many of my territories have been abandoned. I have been unable to keep men in the territory. I have territories that man after man has left because he could not sustain himself and his family under these conditions.

Q. From the standpoint of the company itself, what do you mean by demoralizing effects? A. From the standpoint of S. F. Bowser & Company?

Q. Yes. A. The demoralizing effect I mean there is that for the last 35 years Bowser & Company have been developing and building up this business on the

basis that I have outlined. In the process of this development we have built and equipped a large factory, have had special machinery made to make these equipments. We maintain an organized force of skilled workmen to operate these machines and to assemble and make the pumps, so that with this interference, if I may use the word, our sales of this particular line of equipment have diminished to the extent that our factory has deteriorated, you might say, or reduced its efficiency because of the slackened production.

Mr. Burdeau: That is all. 464

CROSS-EXAMINATION by Mr. Speer:

Q. Have you anything to do with the management of the Bowser Company generally? A. Well, if you will just define "generally," a little bit more?

Q. I mean outside of the sales territory which you cover? A. Yes.

Q. In what way? A. To the extent that we have managers' meetings at our home office at which time policies are discussed that not only pertain to sales but pertain to the production end and other work in general. 465

Q. But you have nothing to do with the management of the home company or anything to do with the details of the manufacture or the keeping of its accounts? A. No.

Q. And you don't know anything about the number of pumps that it is making and selling generally all over the country? A. Why don't I?

Q. How do you know it? A. By statistics that we have right before us to examine, at each managers' meeting.

Q. Have you any of those statistics before you? A. I have not.

466 *H. W. Brown, Cross*

Q. That would show, better than your testimony, as to the actual effect upon the business of the company? A. That is quite true.

Q. Don't you know that the business of the Bowser Company has increased largely in the last years? A. No, sir.

Q. It has been falling off, has it? A. I think, on a shaking down basis, it has not more than held its own.

Q. The officials of the company who really know about the management of the company and have
467 charge of it, would be in a much better position to tell about those matters than you, would they not? A. They probably would.

Q. All you know is what you may have learned in that general way from somebody else? A. No; you are wrong.

Q. Have you ever examined the books? A. I have, and keep records of my own territory, my own district.

Q. Oh, yes, in your own territory. A. I have the records of the entire sales organization in our general work, submitted to us, currently.

Q. Is it not a fact that the demand for pumps
468 of this kind and equipment of this kind has increased largely in the last few years? A. The demand has undoubtedly increased.

Q. And is it not a fact that this method of loaning and leasing such equipment has caused a great many more of them to be installed than otherwise would have been installed? A. That is a matter of opinion only. There is no way to determine that. There is no way of proving that. You are only asking for my opinion; is that it?

Q. Is not that what practically every witness has said here—that it has caused a great many to be in-

stalled and in some cases they were of the opinion that they were unprofitable and would not have been installed otherwise?

Mr. Burdeau: I object to that. The record shows.

Mr. Speer: I will strike that out. I withdraw that. The record shows what other witnesses have stated.

Examiner McCorkle: The objection is sustained.

By Mr. Speer: 470

Q. Is it not your best judgment, Mr. Brown, that as a result of this keen competition in the sale of gasoline and in order to make sales, the loaning and leasing of pumps to the operators has caused the installation of a great many more of these little curb filling stations than otherwise would have been installed? A. I do not think so.

Q. You do not think it has increased it any, then? A. I do not.

Q. At any rate, for some reason, the demand for pumps has been largely increased in the last few years? A. Yes. The demand for pumps has been.

Q. A great many of these pumps have been placed 471 in, in different places, have they not? A. Yes.

Q. And that is true not only in your territory, but is it not true all over the country? A. I could not testify to all over the country.

Q. And that all these pump manufacturers have had an increase, in recent years, in the volume of their business, the number of pumps which they manufacture and sell? A. Now you are asking me something that I do not know anything about. I have no records of the other pump makers, so I do not know.

Q. Is it not only within a very few years that

this system of selling gasoline through these little filling stations has been developed? A. Probably the last 10 years.

Q. Has it not been developing much larger the last two or three years? A. Constantly.

Q. And that has created a demand for more pumps, has it not? A. We will presume that it has.

Q. All right. Somebody has manufactured those pumps? Some manufacturer has made them? A. Yes, certainly.

Q. And all these pumps which the companies in-
473 stall in this way are all bought from some manufacturer, are they not? A. I presume they are. I don't know.

Q. The Gilbert & Barker Company, as I understand, does not use local sales agents at all; they sell direct to large users of pumps? A. They do.

Q. I understood you to say so. Is that a fact? They have no local sales agents in your district? A. No, they have not.

Q. They sell to the oil companies? A. I do not know as to that. I do not know what their policy is. I do not know what they do. The oil company could testify to that better than I could.

474 Q. What other companies compete with the Standard Oil in your district? A. In my district we have the following oil companies operating: The Texas, the Gulf, the Sinclair, the Ohio Cities Gas, the Warren Oil Company, the Kendall Refining Company, the Atlantic Refining Company, and probably some other smaller companies that I do not recall just at the moment.

Q. Do any of these companies install the Bowser pump, aside from the Standard Oil Company of New York, which you say installs the Gilbert & Barker? A. Some of these companies use Bowser equipments, yes.

475

Q. Which companies use Bowser equipment? A. The Texas uses some Bowser equipments; the Gulf Refining Company uses some Bowser equipments; the Sinclair Oil Company have used some Bowser equipments.

Q. And are still using them to a certain extent? A. Yes, in a measure.

Q. And wherever The Texas Company are doing a large business and installing a large number of pumps, it is your company's pumps that they install, as a rule? A. I do not know as to that. They use some of our pumps, but whether it is as a rule or not, 476
that they are using the majority, or exclusively, I cannot say.

Q. Those pumps they buy direct from the company and not through your sales agency? A. That is correct.

Q. It would not help you in your selling of pumps, would it, if the company, instead of leasing or loaning the pump to the operator, would make him their agent and either pay him a salary or allow him a commission, and install the pump on his premises, the same as they do now? A. What do you mean by "the company"?

Q. The company that leases the pump—the oil com- 477
pany. A. Any oil company?

Q. Yes. A. You say it would not help our sales organization?

Q. Yes. A. I cannot see as that would be any deviation from the present policy of the oil companies.

Q. So far as it would affect your business, it would not be? A. I cannot see that it would be.

Q. As a matter of fact, would not that be worse for you, because if they created an agency there, and owned the station, and were employing the operator on salary or commission, there would then be less hope that the pump would be removed than under the present system? A. That is a theory, purely.

Q. Don't you think that would be the result? A. I would want more time than what you have given me to analyze that before answering definitely.

Q. At any rate, that method of doing business would not give you any better opportunity? A. It would not be satisfactory to us, no.

Q. It would not give you any better opportunity to sell pumps than under the present loaning system, would it? A. I don't know. I say I would not answer that question directly without more time to analyze it.

479 Q. Unless the company bought your pump, it certainly would not enable you to make any more sales, would it? Take an illustration that I used before: Here is John Jones, who is talking about having a filling station, or is being talked into it, and the company, we will say the Gulf Company, go to him and loan him a pump, and he operates it and sells their gasoline under their trade brand, without having to pay any rental for the pump. Now, if that is not your pump, you do not get the sale of it, do you? A. No.

Q. That is what you object to—that the pump company has sold that direct to the oil company and the
480 oil company puts it in there and, consequently, you do not get the sale of it; that is what you object to? A. Yes.

Q. If, instead of loaning that to John Jones the company went to John Jones and said: "We want to put in a filling station here, and we want to make you an agent, and have you operate it for us," and that arrangement was made and the company put in this pump, and he operated it for the company, for the oil company, under a salary or under a commission, still they would put in the same pump as they leased him, and it would not help you any to get sales, would it? A. The human equation enters into it so deeply—

I have seen so many filling station propositions of that kind where John Jones would come to the Bowser Company in about two or three months, and put up his own pump.

Q. Isn't he liable to do that when it is loaned to him? If he becomes dissatisfied, he can take it out, can he not? A. It does not belong to him.

Q. He can throw it out, can he not? A. I don't know whether he can. The Standard Oil Company can tell you that.

Q. For all you know he can? A. For all I know, yes.

482

Q. That is all. A. Mr. Speer, I would like to clear up one little point.

Q. Certainly. A. If you will permit it?

Q. Certainly. A. That is, has our business increased?

Q. I don't know. A. I say, I would like to clear that up.

Mr. Burdeau: In reference to that question, he means. He says he wants to clear it up.

The Witness: Do you consent?

Mr. Speer: Certainly.

The Witness: The records of our business will 483
probably show for the last two or three years an increased volume of business, but the increased production of units will not show an increase. The reason is that our prices, like the prices of everything else, have been advanced to meet the increased cost of labor and material and production. So that our prices today are from twenty-five to forty per cent higher, dependent upon the different units, than they were two or three years ago. So that our volume has increased, while our production in units has not. Salesmen sometimes think their business has increased in dollars and cents but in sales it has not. That is one point I wanted to give you in connection with the point you asked me about a while ago.

484 *H. W. Brown, Cross*

By Mr. Nesbitt:

Q. Has not the Bowser Company, during this past year, received orders for all the pumps that it could supply? A. I don't think it has.

Q. Have any of the companies that you have just referred to placed orders with your company during the past year that have not been filled? A. Any of the oil companies?

Q. Yes. A. I don't think so.

Q. Are you positive about that?

485 Mr. Zechiel: As a matter of fact, the Bowser Company had a strike. The question is wholly irrelevant.

Mr. Nesbitt: Well, I don't know. It is a question of production.

Examiner McCorkle: I will rule out anything about strikes.

Mr. Nesbitt: I think he has got a right to develop that.

Examiner McCorkle: You may note your objection. I will rule it out.

Mr. Nesbitt: Do I understand that we cannot develop whether the business of the
486 Bowser Company this year is greater than it was last year, and whether the Bowser Company have not received orders which they cannot fill?

Examiner McCorkle: No, that is not my ruling. My ruling is that you cannot go into the question of strikes as affecting their production.

Mr. Nesbitt: I am not intending to. I am going into their business, as to whether their business has suffered.

Examiner McCorkle: Another thing: I think your associate attorney went into that

business a while ago, very fully, as to whether that company had increased its business or not.

Mr. Nesbitt: I am not clear yet as to whether there has been an increase in the Bowser business during the last few years. That is what I am trying to find out.

Examiner McCorkle: All right. Go ahead and ask your question.

By Mr. Nesbitt:

Q. Do I understand that there has been a greater 488
turn-over in the business of the Bowser Company during the last year than there was in the previous year? A. No, sir.

Q. Then what am I to understand you mean when you said that their books would show an increase in the volume of business?

Mr. Zechiel: I think he explained that fully.

The Witness: I am sorry you did not get that point. I will give it to you again.

Examiner McCorkle: I think that has been all gone over.

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The Witness: The price of the equipment two years ago was one dollar, for illustration. The price of it today is $1.40. That would show two-fifths increase in volume, with no additional increase in output. The volume increase is mythical to that extent, and misleading.

By Mr. Nesbitt:

Q. And you are not marketing as many units now as you were, say, three years ago? A. As I explained to your associate attorney, I have no figures before me, but my judgment is that we are not.

Q. I would like to know if there have not been

orders placed with your company this year which have not been filled? A. I will refer you to your associate on that. He says the home office is the place to get that information. As far as my territory is concerned, there have not been any placed that were not filled. We have had stock constantly.

Q. You do not know whether any orders have been placed with your company that have not been filled during the last year? A. I would not make affidavit to that, no. As I said before, the record at the home office would have to show that point. I will say this:
491 There have been no orders placed by any individual user with our company that have not been filled. If there are any orders that have not been filled, they were placed either by the Texas Company or the Gulf Company.

By Mr. Schekter:

Q. Does the territory in which you have general sales supervision include any territory which the Atlantic Refining Company is operating? A. Yes.

Q. What territory is that? A. That is eastern Pennsylvania.

Q. Do you know, of your own knowledge, the terms
492 of the agreements of lease and loan under which the Atlantic Refining Company is placing the pumps with the several dealers? A. No, of my own knowledge I do not.

Mr. Schekter: Mr. Examiner, at this point, it being the first point in the proceedings at which the Atlantic Refining Company has been directly complained of, I move that all the testimony of the witness, all of the testimony not of his own knowledge, be stricken from the record.

Mr. Burdeau: I do not think there has been any attempt to characterize any of this testimony as hearsay.

493

Mr. Zechiel: There has been nothing pointed out as to what that evidence is.

Examiner McCorkle: The motion is overruled, as too general and not in apt time.

By Mr. Schekter:

Q. Do you know whether the Bowser Company sells any of its apparatus or equipment to the Atlantic Refining Company? A. Yes.

Q. You say that it does? A. No; I say I know.

Q. Does it? A. No.

494

Q. Would you be surprised if I told you that the Bowser Company has, in fact, been supplying to the Atlantic Refining Company pumps and general equipment such as is being installed? A. When?

Q. Are you so positive now that you have the entire information on the subject that you are willing to go on record here as testifying that, in fact, no such sales have been made by Bowser to the Atlantic Refining Company? A. Your last question was what?

(The reporter repeated the question as above recorded.)

The Witness: I would be surprised, yes. Now, tell me, do you mean now or in the past?

495

By Mr. Schekter:

Q. Just assume that I mean at any time. A. Oh, in years gone by I would not be surprised, no.

Q. Do you know, of your own knowledge, as to whether, in years gone by, they have supplied equipment to the Atlantic Refining Company? A. Yes, in years gone by.

Q. How recently has that been? A. To my knowledge it has not been in the last three or four years.

Q. Do you know, further, that the Bowser Company has refused to sell to the Atlantic Refining Com-

pany equipment for installation under lease and loan agreements, but that they have sold the Atlantic Refining Company for resale? A. You say do I know?

Q. Do you know that? A. I do not.

Q. But you do not know that that is not so? So far as you know, that may be true? A. Yes.

Mr. Schekter: That is all.

RE-DIRECT EXAMINATION by Mr. Zechiel:

497 Q. When you testified in respect to the equipment, pump and tank equipment sold to the Atlantic Refining Company, you are testifying with respect to your territory? A. Yes; I am testifying with respect to my territory, and with respect to my own knowledge on the subject.

Q. Is it not a fact that in the last year the Bowser Company has had a strike in their factory? A. Yes.

Q. How long has that been? A. How long since the strike?

Q. No. During what period of time was the strike on in your factory?

498 Mr. Schekter: Is this the testimony that the Examiner ruled out?

By Mr. Zechiel:

Q. Answer the question, unless the Examiner rules it out. A. The strike was on for about ten weeks. I would like to explain that more definitely, since the case is opened up. This strike began, we will say, about the first of July, as I recall it, or the first of June, and for a time, about ten days, or such a matter, the plant was entirely closed down by Mr. Bowser himself. Then he opened up, and we have been building up ever since.

Q. So that there was a time when there was very much underproduction by your company during this year? A. There was.

By Mr. Nesbitt:

Q. Did you lose any customers as a result of that —regular customers? A. I presume by that you mean did we have any cancellations?

Q. Any large cancellations? Well, never mind, we can develop that otherwise. A. I do not know that I can answer that anyway.

Examiner McCorkle: Is the question withdrawn? 500

Mr. Nesbitt: Yes.

(Witness excused.)

Whereupon, at 12:30 o'clock P. M., a recess was taken until 2 o'clock P. M.

After recess.

CLAUDE P. HEARN was thereupon called as a witness and, having been duly sworn, testified as follows: 501

Direct-examination by Mr. Zechiel:

Q. State your name and address. A. Claude P. Hearn, Wilmington, Delaware.

Q. With whom are you employed? A. I am in business for myself, the Hearn Oil Company.

Q. What is your relation to that company, officially? A. I am manager, and practically it.

Q. And owner of the company? A. Half owner, and practically it.

Q. Is it a corporation? A. A co-partnership.

Q. How long has your concern been in business? A. May 20, 1912.

Q. Did you have any experience in the oil business prior to that time? A. Nine years.

Q. With what concern? A. Previous to that I was with the Indian, and previous to that the Standard Oil Company of Baltimore, which is the Standard Oil Company of New Jersey now, I understand.

Q. What is the territorial extent over which your company does business? A. We have a plant at Wil-
503 mington that operates in Wilmington, and we serve about one-third of the state from there We have a place at Middletown that—

Q. What state is that in? A. That is in Delaware. That takes on another part of the state down through part of Kent, all of Newcastle, and part of Kent. Then we have another branch at Chestertown, Maryland, which operates in Maryland exclusively, which takes in about four counties, and comes up as far as Cecilton and down six miles below Centerville, Queen Anne County.

Q. In about what part of Delaware do you sell your product? A. In about one-half.

504 Q. And of Maryland? A. It is hard to say. We only take about four counties, and I think there are twenty-six in Maryland.

Q. Do you sell your product in any other states than Maryland and Delaware? A. Other than we have two or three points that we make right on the edge of Pennsylvania. There are only about two towns over there. Wilmington is only nine miles from the line.

Q. In connection with your business, have you had occasion to travel over the entire area? A. Yes, sir.

Q. Are you acquainted in a general way with the

505

distribution of your product through the retailers? A. Yes, sir.

Q. In that connection have you come more or less intimately into personal touch with the retailers of your product? A. Practically every big customer that we have I know.

Q. Your general business is the retail of gasoline products and refined oil? A. No; we are classed as jobbers. We sell to the garages. I consider retail as the man who is selling it to the automobiles. We do not sell that way.

Q. But the produc. you sell? A. Is to the stores 506
and automobiles.

Q. What is the product? A. Kerosene, lubricating oils, gasoline, greases and fuel oil.

Q. In connection with your business, do you also handle oil tanks and pumps? A. Yes, sir.

Q. Do you sell such equipments to your customers? A. We did. Not now.

Q. Do you lease and loan such equipment? A. We do.

Q. For how long have you been leasing and loaning such equipment? A. About eighteen months.

Q. Prior to that time were you handling the equip-
ment then? A. Yes, sir. 507

Q. Prior to that time eighteen months? A. Yes, sir.

Q. How did you dispose of your oil tanks and pumps? A. We sold them to the customers.

Q. For how long had you been doing that? A. Ever since we had been in business.

Q. In a general way, about how many oil tanks and pumps have you people sold to your customers? I am talking about the sales, now. A. Not very many, as a matter of fact, previous to this loaning of oil tanks and pumps we tried to dodge it. I mean if we could get a man to buy direct from Bowser or Wayne, or

any of the others, the oil pump and tank, we were tickled to death not to handle it; we didn't want it; we only handled it in cases where the customer was going to buy through an oil company, and then we made an effort to sell him; but if we could get his gasoline business without doing it, we were tickled to do it.

Q. So that you sold comparatively few equipments? A. Very few.

Q. After you began leasing and loaning, did you sell any equipments? A. Yes, sir; we sold, I think,
509 one, day before yesterday.

Q. You are now selling such equipments, and have continued to do so? A. Yes, sir.

Q. About what part of your distribution of oil tanks and pumps is sales and what part lease and loan? A. About nine parts leased and one part sold.

Q. About how many lease and loan equipments have you put out with your customers? A. About thirty or forty.

Q. That is the total number? A. I have not the figures, but I should say that is about it—thirty or forty.

Q. You say, prior to about eighteen months ago,
510 you did not engage in leasing and loaning at all? A. Not at all.

Q. What was the occasion of your beginning to lease and loan oil tanks and pumps? A. The Atlantic Refining Company, of Philadelphia, offering our customers—or offering our prospects, I would say, pumps and tanks on a lease. We did not have any chance of selling them.

Q. Do I understand you to testify that you did it to meet competition? A. To meet competition.

Q. Did any other oil company besides the Atlantic Refining Company engage in that practice prior to the time when you began it? A. The Standard Oil Company of New Jersey.

Q. Any other? A. Not prior to that. They are now.

Q. I am talking about prior to that. A. No, sir.

Q. At the present time, who are they? A. Crew-Levick and the Pure Oil Division of the Ohio Cities gas.

Q. Does the Texas Company sell in your territory? A. No.

Q. The Gulf Refining Company? A. Not in our territory, no.

Q. Prior to the time that you began leasing and loaning these equipments, or since that time, have you 512
lost business because a competing oil company did lease or loan such equipments? A. Yes, sir.

Q. Please state that more in detail? A. How do you mean more in detail.

Q. Describe the practice. A. For instance, I do not loan promiscuously. I mean, in other words, I have got to see the gallonage to justify it. There are quite a few that I will probably think of later in my testimony, if you want the names, where they probably thought it would justify it and I did not. I can name one that happened this week: F. B. Norman, of Wilmington, was loaned a pump and tank, five-gallon throw, by the Atlantic Refining Company. The gal- 513
lonage from his location does not justify it.

Q. In your opinion? A. In my opinion, I am speaking of, yes; and they have got the business.

Q. Prior to that time was he a regular customer of yours? A. A regular customer, yes.

Q. He had had installed an oil tank and pump, I take it, before this? A. I had sold it to him.

Q. And has that been a frequent occurrence in your experience? A. Very frequent—which do you mean? I am dealing with the Standard Oil Company of New Jersey and the Atlantic Refining Company, too. Do you mean to ask about the Standard Oil Company or the Atlantic Refining Company, or either?

514 *Claude P. Hearn, Direct*

Q. I am asking with respect to both, but I think you had better separate your answer, speaking with respect to the Atlantic Refining Company. A. I cannot say that I have lost frequently, because I will put it in where the gallonage justifies it. I have not lost any business on that.

Q. Prior to the time that you began installing on the lease proposition, had you lost business because you refused to install? A. I only lost them once or twice before I met it.

Q. Now, with respect to the New Jersey Company?
515 A. Have I lost any business?

Q. Yes. A. I have lost customers, but I have not lost gallonage. In fact, I have gained gallonage.

Q. But you did lose individual customers? A. Yes.

Q. Was that a frequent occurrence or not? A. I should say it was very frequent.

Q. That is down in Maryland, I assume? A. Yes; they operate in Maryland.

Q. In the conduct of your business, you buy your gasoline and other products? A. Yes; we have our storage tanks there and ship it down in boats and tank cars.

Q. When you speak of a loss of business because of
516 this practice, I direct your attention to your business with respect to lubricants, rather than gasoline, now; have you lost lubricant business of your customers because of the lease and loan agreements that other companies have entered into? A. I have, but as I say, the same thing applies to gasoline. I would not allow any competitor to beat me on a price. I would sooner go out of business. So I have met them.

Q. You are speaking of the price, or speaking as to a lease and loan proposition? A. I am speaking as to a lease and loan of equipment. I have lease and loan of lubricating equipment, too.

Q. And that was for the same reason to which you

have testified with respect to the other equipments? A. That is for the same reason, yes.

Q. From your experience in the sale and distribution of gasoline and lubricants, as you have testified, do you think that this practice of leasing and loaning oil tanks and pumps for a nominal consideration, under agreements or understandings that the lessee thereof shall not use in connection with such equipments the gasoline products of any other company than the party who is the lessor is a good practice?

Mr. Speer: We object to that as incompetent, irrelevant and immaterial. 518

Mr. Schekter: I object on the further ground that, as to the Atlantic Refining Company, it has not shown that leases are made for a nominal consideration.

Examiner McCorkle: The objection will be noted. Proceed.

The Witness: You are asking for my personal opinion, is that it?

By Mr. Zechiel:

Q. Yes. A. Do I think it is a good practice?

Q. Yes. A. I think it is an unfair practice. 519

Q. What is your reason for that conclusion, or what are your reasons? A. In the first place, it is in restraint of trade in my estimation.

Q. Speaking more particularly to the economic situation, as a business practice, rather than as a violation of any law or anything of that sort, speaking as a business man? A. I do not know just how to express myself. It curtails competition. There is no competition to it. If I have got a customer and he has got my pump and tank, there is no chance for the other fellow to put it in until my pump and tank comes out. I have no competition. The other fellow

has no competition when he has his pump and tank. If he is any kind of a decent man, he is not going to put my stuff in the other fellow's tank, and if he is not, he is not worth selling, especially on credit.

CROSS-EXAMINATION by Mr. Hayes:

Q. Mr. Hearn, do you deal in pumps—curb outfits? A. Do I buy them?

Q. Are you a dealer in pumps? A. I don't know how you would classify me. I am a jobber. I get
521 the jobber's price on pumps and tanks. I buy them and will sell them.

Q. Do you do an oil business as well as a pump business? A. Yes; I handle pumps and tanks.

Mr. Hayes: That is all.

By Mr. Speer:

Q. Do you sell gasoline under a particular brand of your own? A. No.

Q. You do not use any brand? A. No.

Q. A great many of the dealers do have a brand, and they seek to advertise it as theirs and try to create a demand for their product, do they not? A.
522 Yes; I notice their signs up.

Q. And if they keep it uniform, and of a good quality, that will give them a reputation for handling a good grade of gasoline? A. You did not put that in the form of a question, did you?

Q. Yes. A. I should say yes.

Q. Is it not the purpose of a marketer of gasoline to go into a territory and develop it and try to create a demand for his products, and to establish there a permanent list of customers? A. We all want customers, naturally. We want a market for our stuff.

Q. And you want, if possible, to get customers that will stay with you, and in order to get them to stay

with you, you try to give them a good grade of goods? A. We do.

Q. The purpose of a company that is in business permanently is to try to get a permanent trade, so that it does not have to jump from one customer to another, but to get a customer who will need gasoline and keep supplying him with a good grade, and try to hold him? That is the business practice, is it not? A. Well, we do not advertise it under one brand, and our gallonage has increased from year to year and from month to month.

Q. And you have not suffered any loss? A. No; I 524
have not suffered any loss.

Q. And, as a matter of fact, there is more competition in your territory than there was? A. No.

Q. Are there not more companies operating them than there used to be? A. The only one that has been in addition in seven years is Crew-Levick.

Q. And that one has come in? A. That one has come in.

Q. And the others have been there all the time? A. The others have been there all the time, yes.

Q. You say the objection to this leasing of the pump and tank is that it ties a man up to take that particular gasoline, so that you can get that customer 525
away from the person who is furnishing gasoline? A. That is true.

Q. How do you deliver your gasoline? A. By wagons and trucks.

Q. Do you own those wagons? A. I do.

Q. And the drivers are in your employ? A. Yes; they are.

Q. And those trucks, naturally being yours, do not deliver any other gasoline but yours, do they? A. They do not.

Q. Would it not be possible for a man who wanted to go into the retail business and establish a route, as

we used to have milk routes in the little cities—would it not be possible for him to buy one of those tank wagons and work up a route of his own to which he would supply gasoline? A. Would it not be possible for another man to go into business with a truck?

Q. Yes. A. It would.

Q. And own his own truck? A. It would.

Q. Well, now, if he owned his own truck, then he could buy gasoline from any person he wanted to, could he not? A. He could; but he could not buy it very profitably.

527 Q. That might be. Does not that depend upon whether he had enough business to justify his getting a good rate? A. I mean, buying it in trucks, he would get the same price the garages get, so that he could not sell it profitably, certainly.

Q. Might he not build a little tank, after a while, so that he could get a larger quantity? A. Oh, he could do anything.

Q. In that case, if he owned his own tank wagons, he could buy from everybody could he not—he could buy any gasoline, if he wanted to? A. I don't know whether he could or not. I don't think he could, as a matter of my personal opinion.

528 Q. Would you refuse to sell him gasoline? A. I would not want to sell him. I do not say that I would not sell him.

Q. You would not want to sell him, because he would be competing with you and with your tank wagons? A. No; not for that reason.

Q. Why wouldn't you sell to him? A. I just would not want him hauling out my stuff in competition with me.

Q. Can you not see that by your owning your tank wagon and allowing no gasoline but yours to be distributed in it that you are restraining the trade just as much as the man who owns the pump and does not allow any gasoline to be sold through it except his?

Mr. Burdeau: I object to that, as calling for a legal conclusion, Mr. Examiner.

The Witness: I cannot see it.

By Mr. Speer:

Q. You say you have lost customers, but you have increased your gallonage? A. Yes.

Q. I infer from that that you must have gotten other customers? A. I have.

Q. Is not that the rule in every community where there is competition—active competition—a man is losing customers, and on the other hand, he is getting 530
customers? A. That is true.

Q. There could not be any competition worth calling competition unless it took away, occasionally, some of your business: isn't that a fact? A. Why, sure.

Mr. Speer: That is all.

By Mr. Schekter:

Q. Have you ever seen a copy of the lease agreement under which the Atlantic Refining Company places this equipment with dealers? A. No, I have not.

Q. Do you know that, as a matter of fact, the dealer 531
has a perfect right to buy and sell the gasoline and petroleum products of any other person, dealer or corporation?

Mr. Burdeau: I do not want to be technical about that, but I believe those leases will be in evidence and will speak for themselves.

Mr. Schekter: Then we will let it rest with the fact that the witness admits that he does not know the terms of the agreement under which the Atlantic Refining Company is operating.

Examiner McCorkle: Certainly.

Mr. Zechiel: In fact, the agreement has been made a part of the answer.

By Mr. Schekter:

Q. I just want to clear up the case cited by you of F. B. Norman, of Wilmington. A. Yes.

Q. Who you say was approached by the Atlantic Refining Company and subsequently became a customer of theirs. A. Well, it has been too early—I presume he is going to become a customer. If I put a five-gallon pump in, he would.

533 Q. You say you had actually sold him a tank and pump prior to that time? A. Yes, I had.

Q. He had that at the time? A. He had that in the back.

Q. And he had it at the time that the Atlantic Refining Company negotiated with him? A. Yes; absolutely.

Q. And notwithstanding that, he agreed to enter into an arrangement with them? A. Well, he has got it in front there. I don't think he is going to be a poor enough business man to let me put gasoline in there.

Q. You are simply giving your guess, now, are you? A. They put it in there free of charge, according to

534 F. B. Norman, and according to his sales manager, Mr. McDonald.

Mr. Schekter: I move to strike out the witness's answer because it is not of the witness's own knowledge.

Examiner McCorkle: These men stated to him that fact.

Mr. Schekter: That is my objection, if the Examiner please.

Examiner McCorkle: The objection is overruled.

By Mr. Schekter:

Q. What has he done with the other tank? A. The other tank is still in there.

Q. Is he using it? A. This only happened this week, and as the sidewalk is blocked off in the front, I don't know what will become of the case.

Q. That is not answering my question. I say, is he still using the old tank?

Mrs. Zechiel: If the Examiner please, I think it is an answer to the question. If you just want to get further information, I have 536
no objection.

Mr. Schekter: I would like to have the question and answer read.

(The question and answer were repeated by the reporter as above recorded.)

By Mr. Schekter:

Q. Now will you please answer my question? Is Mr. Norman using the old tank? A. I presume he is.

Q. Do you know? A. I don't know. I have not been up into his garage.

Q. There is absolutely nothing, is there, to pre- 537
vent Mr. Norman's buying your gasoline or the gasoline of any other producer and selling it through the other pump and tank? A. That I have no knowledge of. I don't know.

Q. As far as you do know—and you have undertaken to testify in this case—is not that the fact? A. Yes.

Mr. Schekter: That is all.

RE-DIRECT EXAMINATION by Mr. Zechiel:

Q. In that respect, what is the practice in your territory? Do garage men generally have installed more

538 *William O. Custer, Direct*

than one oil tank and pump? When I say garage men I mean retailers generally. A. Generally they do not; because, as far as we are concerned, I will not have anything to do—as far as putting in a leased equipment where there is already another equipment.

Q. Would you say that the instances where there is more than one equipment, are rare? A. They are rare, yes, sir.

Mr. Zechiel: That is all.

(Witness excused.)

539 Mr. Zechiel: Let the record show that W. C. Mallette and C. N. Cumberland are employees of the Bowser concern, and that if called to testify they would testify, in general, as previous Bowser witnesses have testified, both on direct and cross-examination. Is that satisfactory?

Mr. Nesbitt: Yes.

WILLIAM O. CUSTER was thereupon called as a witness and, having been duly sworn, testified as follows:

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Direct-exmination by Mr. Zechiel:

Q. State your name and address, please? A. William O. Custer, 111 North Broad Street, care of Crew-Levick, Philadelphia.

Q. With what concern are you associated? A. With the Crew-Levick Company.

Q. What is your official position with that company? A. I am manager of tank stations.

Q. How long have you held that position? A. Since May of this year.

Q. Prior to that time what was your employment? A. General manager of the Massilon Electric & Gas Company, Massilon, Ohio.

Q. Your connection with the Crew-Levick Company is since May only? A. Yes, sir.

Q. What is the general territorial extent over which your company does business? A. The department over which I have charge is a part of Pennsylvania, part of New York, part of New Jersey, part of Delaware, and some of Maryland.

Q. The general line of business that your company is engaged in is what? A. Producing, refining and 542
marketing petroleum products.

Q. That includes gasoline and refined oil? A. Yes.

Q. And various lubricants? A. Yes, sir.

Q. In connection with the distribution and sale of your products, do you also deal in oil pumps and tanks? A. Yes, sir.

Q. For how long a time have you been engaged in that? A. Since my connection with the company that I am sure of, and I think previous to that time.

Q. You do not know how long prior to that time? A. I could not say how long.

Q. Do you sell such equipments? A. Yes, sir. 543

Q. Do you also lease or loan such equipments? A. No, sir.

Q. Do you know whether your company has ever leased or loaned such equipments to customers? A. I imagine they have, at some time, to some extent.

Q. But since your connection with the company they have not? A. They have not, no, sir.

Q. Do you know the number of pumps that have been sold by your company? When I speak of pumps, I mean the entire equipment, or whatever part you do sell, since your connection with the company. A.

I do not know the total number. The number last month was seventeen.

Q. You do not know prior to that time? A. I should say seventy-five, or maybe more, since my connection with the company.

Q. To whom did you sell such equipments, in a general way, to what class of people? A. To garages and accessory stores, grocery stores, one to a jewelry store.

Q. A jewelry store? A. Yes.

Q. In connection with your business have you had
545 occasion, since you have been employed by the present company, to travel about over your geographical area? A. Yes, sir, quite frequently.

Q. In doing so have you come in contact with the retailers on your product? A. Quite a lot, yes, sir.

Q. Do you know whether or not your company has lost business since you have been connected with it, because it refused to install oil tanks and pumps for a nominal consideration only? A. We have lost some customers by reason of that.

Q. When you say "some," could you be more specific about it? A. I would not even guess how many. It is quite a number. It happens every day or two.

546 Q. Every day or two? A. Yes.

Q. Do you know what is the occasion of your loss of such customers in detail, or are you personally acquainted with that? A. Yes; by reports more than by personal experience; by reports of our salesmen and of our tank station agents.

Q. Those reports are to you, are they not? A. They are to me, yes.

Q. What have been the general circumstances of such losses of business? A. Most usually the case where we will not lease or loan equipment, and where some competitor has seen fit to lease or loan the equip-

ment. I want to be clear on that question before that. I do not want you to be misled by that answer. I said that we had lost some customers. I do not mean that, as a whole, our gallonage had not increased. We lose one customer one place, by reason of that, and go out and get one or two more, maybe, some place else; so that the total of our gallonage, possibly, has increased; but we have lost some particular customers.

Q. In that connection, have you ever been able to supply the loss of business because of this practice by selling goods to a retailer who had installed, at 548
the time, an oil tank and pump under a lease contract with some other company that was selling goods to them? A. Do you mean, have we been able to put in our goods in somebody else's tanks in a leased tank that somebody else has leased to a customer?

Q. I was not trying to go quite that far, no. I meant only in this connection: You lose a customer, say John Jones, because some oil company supplies him with an oil tank and pump as testified. Now, you also say that you have not lost gallonage, because you have gotten other customers to take the place of the customers you lost. Now, with respect to these customers you get subsequently to replace those you have 549
lost, are those customers retailers who are already under lease contracts with a competing oil company? A. It is not always the rule, but that has been the case in some instances. We have gone out and been able to sell equipment to a customer who has in lease or loan equipment of some of our competitors, by reason of some misunderstanding arising between the customer and the competitor.

Q. You say that has been the usual rule? A. No; it has happened.

Q. That is rather the exception? A. Yes.

Q. Is it a fact, then, that most of these customers that you get to replace the lost customers about which you have testified are customers who are not under lease contracts? A. Yes, sir.

Q. Are those customers, if you know, usually new customers in the retail oil business, or are they established? A. A big percentage of them are new.

Q. When you did get those people who were new at the game, who were just starting in the business, in those cases did you sell them a pump outfit? A. Yes, sir.

551 Q. Who are your competitors in your territory? A. The Gulf Refining Company, the Texas Company, the Atlantic Refining Company, in one territory the Standard Oil Company of New York, and also the Standard Oil Company of New Jersey, the Hearn Oil Company, and quite a number of others.

Q. Do the facts about which you have testified apply generally with respect to each of these competitors of yours and their territories—your loss of business and your replacing of business and, in general, the things to which you have testified? A. I should say so, yes, sir.

552 Q. What has been your experience—do retailers of gasoline usually have installed more than one oil tank and pump equipment for the distribution of gasoline? A. In some localities they have, more especially in Philadelphia you will find a garage with one company's pump on one side of the door and another company's pump on the other side of the door, and possibly if there is a back door to the garage, they have still another company's pump.

Q. Is that a frequent occurrence in your competitive area, or is that an unusual situation? A. I would rather say it was the unusual situation. We possibly have in quite a number of places in Philadelphia, but

a small per cent as compared with the total number of garages.

Q. From your experience with your company and your company's business, do you think the practice of leasing and loaning these equipments under conditions and understandings that they are not to be used in connection with the distribution of other gasoline products than those of the lessor, is a sound business practice?

Mr. Speer: I object as immaterial, irrelevant and incompetent.

554 Examiner McCorkle: The objection is noted. Proceed.

The Witness: I do not think so.

Mr. Zechiel: That is all.

CROSS-EXAMINATION by Mr. Nesbitt:

Q. Mr. Custer, I am not just clear whether the Crew-Levick Company has engaged in the practice of leasing equipment since your term of service with them began? A. No, sir, they have not.

555 Q. But at one time the company had engaged in that practice? A. To some small extent; to no great extent. I do not believe our records will show that there are over about ten pumps that were originally put out on such an agreement, and most of them have been taken in since that time.

Q. Has your company, to your knowledge, considered engaging in that practice recently? A. Yes, sir. We have had it under consideration ever since this matter has been agitated before the Federal Trade Commission, awaiting their final action on it, to determine what to do. If the practice is going to be

indulged in generally, I imagine we will have to go into it ourselves; but we would very much prefer that it would be stopped.

Q. Do you know the reason why the company did not go into the practice generally? A. It was a very expensive practice to them, what experience they did have with it. It looked like folly for the reason that it requires a big investment, and you usually put that investment into a place that is a very poor credit risk; and the ordinary small garage usually changes hands quite frequently, and it causes you more or less trouble;
557 so that we would rather keep away from it if it is possible, if all of our competitors would get the same slant on it.

Q. Then it is true that the company did not engage in the practice simply because they thought it an inconvenient business practice? A. It is a poor business practice—a bad business practice.

Q. Bad from what point of view? A. The tremendous investment that it requires. When you go out and loan a man a pump and tank and hose and all that equipment, he will not take care of it at all, because it is your equipment; but if it is his own, and he has his money invested in it, he will take care of
558 it and try to maintain it, and see that it is kept in condition.

Q. In other words, your company views it as an unprofitable policy? A. It is unprofitable.

Q. And that was the reason, was it, why the Crew-Levick Company did not engage in the practice? A. It was unprofitable, and it was not good business.

Q. From the point of view of profit? A. From the point of view of profit and business ethics.

Q. Would you say that the consideration of profit was the dominant consideration in determining the policy of the company? A. That is usually the dominant feature of any business.

Q. The Crew-Levick Company, in your territory, has as many customers now, has it not, as it had at the time that you came with the company? A. I would hate to say, under oath, because I don't know how many they had when I came.

Q. I know you could not give figures? A. I hope they have.

Q. You regard your trade as numbering as many customers as it did at that time? A. I think so. I hope so, at least.

Q. You are marketing in your territory, are you not, all the product that is available to you to supply? 560
A. Yes.

Q. When you engage in this practice of selling pumps to customers, how do you handle those pumps? Do you get them into storage from the manufactories, or do you just negotiate individual sales, and then send to the manufacturer for the individual equipment? A. We get them into storage, into our warehouse.

Q. And then sell them out? A. And then sell them out from there.

Q. You buy those pumps and other equipment direct from the manufacturer? A. Direct from the manufacturer. 561

Q. You do not buy them through a local sales agent of the manufacturer? A. Well, yes, from the local representative of the manufacturer, who calls on us. We buy them from him.

Q. You pass him the order? A. We pass him the order.

Q. You do not deal direct with the headquarters of the company, at all? A. That is dealing direct with the headquarters of the company, I take it. It is the representative of the factory, of the manufacturer—their direct representative. I do not see how, if you

562 *William O. Custer, Cross*

went right down to the factory, you could deal more directly than if the factory sends a man to your office.

Q. What I mean is this: Do you make those purchases through a district salesman for the manufacturer? A. No.

By Mr. Speer:

Q. Do you buy them in quantity, or just singly, as as you need them? A. We buy them in quantity.

Q. Does your company put in any large service stations in the larger cities where you operate, into
563 which the automobile can drive and be supplied with gasoline? A. We have not put in any lately. We have three service stations in operation. This year we have not built any new ones.

Q. It costs considerable to buy a location and equip a service station of that kind, does it not? A. It is quite expensive.

Q. That is a practice amongst the marketers of gasoline, is it not, as well as the use of these smaller pumps? A. Yes, sir.

Q. And of course in that service station they have their pumps and tanks, similar to these curb pumps? A. Yes, sir.

564 Q. Something of the same kind? A. Yes.

Q. Don't you think that is more expensive, to undertake to serve a community that way, than to put in a few curb pumps which cost to install and equip? A. I don't think so, no. It depends a lot on conditions. It might be in one case and it might not be in another.

Q. Does your company establish filling stations which are operated by your own employees or agents, making them agencies for the distribution of your product? A. I don't know just exactly what you mean. You mean, do we go out and install a pump some

place and then pay somebody a commission to operate that pump?

Q. Yes; or a salary to look after it? A. No, sir, except at our service stations, our regular service stations. We do not go out to somebody who has a location or a good place to put a pump, and install the pump and then ask him to run it for us, or hire him, or pay him a commission.

Q. You do not do that? A. We do not do that.

Q. It is a fact that quite a few of the large marketers do adopt that system of getting their product to the public, to a certain extent, is it not? A. I 566
have understood so. It is merely another way around this same question.

Q. So far as that is concerned, there is just as much objection to this as to the loaning system? A. Yes; the same thing.

Q. Your objection being that, being their station, you cannot sell any gasoline through it? A. That is the idea.

Q. Is it not their purpose in establishing the station, in order that they may be able to reach the ultimate consumer with their product under their own brand, and to develop their business in that way? A. That is one of the ideas; and to eliminate competition. 567

Q. Then, as a matter of fact, Mr. Custer, your company seems to be, so far as the handling of gasoline is concerned, more of a jobber? You sell in quantity to retailers who are dealing with the public, and you are not endeavoring to reach the ultimate consumer with your product at all? A. Except through the service stations I mentioned a while ago.

Q. I think you said in the beginning that you do not seek to sell to the owner of the automobile except as he may come to these few stations that you have? A. Well, yes; but we try to create a market for our

goods, and the pumps that we sell have our trade-mark on them.

Q. After that pump is installed, with your trade-mark on it, you expect him to sell your gasoline through it, do you not? A. Yes.

Q. Isn't it a fact that you would not permit him to sell any other gasoline through that pump with your trade-mark on it? A. That is one of our talking points, that we do not ask them to sign a contract to use our gasoline alone, even though he bought the pump from us and has not paid for his pump on
569 the installment plan. Say that he has paid half of his pump, and, for some reason or other, our service or gasoline was not satisfactory, he can buy your gasoline tomorrow. We do expect him to buy our goods.

Q. So long as he kept your trade-mark over his pump, you would insist that he sell your goods through it, would you not? A. We request him to; but we have no hold on him, no way to make him.

Q. Do you mean to say that you will knowingly allow somebody to sell something that is not your product, as your product? A. We do not if we can avoid it; naturally not.

570 Q. Naturally you would not? A. We do not tie them up into a contract that they will use only our goods.

Q. Don't you think if you found a man who had your trade-mark on his pump and was selling somebody else's gasoline through it, that you would endeavor to stop him? A. I don't know whether we would or not; because there is quite a number of pumps, quite a number of customers who the companies do what they call split the business with—your company will have it this month and we will have it the next month; they are friends to both, and

your goods are selling through the pump one month and ours the next month.

Q. With the same sign on it? A. With the same sign on it.

Q. Is not that a fraud on the public, to make them think they are getting one brand of gasoline when they are getting another? A. It may be.

Mr. Burdeau: I object to that question as involving the assumption that any sign on a tank is a guarantee of the contents. I do not think there is any proof here that it is.

572 Mr. Speer: I think some things would be assumed without proof.

Mr. Burdeau: That is the reason I object to that particular question, because it involves just that assumption. I personally cannot see how a sign on a tank guarantees the particular contents of that tank.

Mr. Nesbitt: As a matter of fact, it always does.

Mr. Burdeau: Let us prove it.

By Mr. Speer:

573 Q. Is it not a fact, Mr. Custer, that the purpose of putting the sign with the trade-mark upon the pump through which the gasoline is furnished, is to show the brand of gasoline that is being furnished by that pump? Isn't that what it is done for? A. To some extent. It is merely to advertise the name of the company as much as anything else, not only their brand of gasoline. Crew-Levick does not mean gasoline. It means the name of the concern that handles gasoline and motor oils.

Q. And when you have Crew-Levick, the name Crew-Levick on a pump, isn't that holding out to the

public that they are getting Crew-Levick gasoline? A. Yes.

Q. That is the way the public regard it, is it not? A. Naturally.

Q. Now, you say in some of the garages there are from two to possibly three pumps, and in the majority but one. Is it not a fact that it is the large garages that have a large business that maintain more than one pump as a rule? A. I should not say so, no. I do not know that you can do it now but pretty nearly anybody two or three months ago, or three or four
575 months ago, could have the Texas Company put in a tank and pump and then the Atlantic or Gulf, or most any one come along and put one right across the roadway from it.

Q. Is there a practice to put two pumps in a small garage that has a very small amount of business? A. Not a general practice, but it is done.

Q. It is done in some cases? But usually a small garage where the business is not large would not want to be bothered with more than one pump? A. No; they would not want to be bothered, but the oil companies have had a practice of going out where they could and get them to put in the other pump.

576 Q. The garage man does not need to put it in unless he wants to? A. No.

Q. Is it not likely, if he had not much space and a small business, that one pump is all he would want? A. That is all he would want, yes.

Q. And if he owned it, himself, it is all he would put in—one pump? A. Certainly.

Q. There are, of course, nowadays, quite a lot of little garages in every town? A. Yes.

Q. So that you may find, on one side of the street, a garage with one man's pump and sign, and across the street a garage with another pump and a different sign? A. Yes.

Q. So that the automobilist who is driving along and sees two signs of different gasoline, can choose which he wishes to have put into his automobile? A. Yes; that is quite true.

By Mr. Burdeau:

Q. I would like to know, in absolute fairness, how you will answer this question: Do you know enough about the retail distribution of gasoline to say whether or not it is the sign on the pump, or the personality of the garage man or dealer which determines whether or not an automobilist shall deal there? In other 578
words, does the garage man attract his customers through his service and his personality and other business qualifications, or are his customers attracted by the sign on the pump? A. That is a pretty hard question to answer and answer intelligently. I would say in your own town, where you are acquainted, it is the personality of the garage man alone; but if you were driving away from your home town, over to a strange town, you might look for a gasoline which you knew the trade-mark of.

Q. Do you believe that to be the general rule? A. That is, I would say, the general rule; but in your home town, where you are well acquainted, you are 579
likely to buy from the man you know best, regardless of the kind of product that he handles.

Q. I want to be complete about this, and absolutely fair about it. Do you believe it to be the general rule that when a motorist leaves his own town, where he knows some garage manager, he will seek a place bearing the sign of a brand that he knows? A. He is more likely to do that.

By Mr. Schekter:

Q. If the Atlantic Refining Company wants to protect its trade-mark and its trade name, the only way

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it can possibly do it is by insisting that through its equipment there shall only be sold and furnished the Atlantic gasoline? A. I should say so.

Q. In the efficient and proper distribution of gasoline to the public, is it not true that throughout Pennsylvania it would be a financial impossibility to establish service stations in the sparsely settled districts? It would be ruinous financially to do that? A. Yes.

Q. And the curb pump is the only effective method of making that distribution? A. I would say so.

581 Q. Have you not found out, in your experience with the Crew-Levick Company, that it is not possible, in many cases, to persuade a person who has a proper location to buy a pump or pump equipment? A. I do not say so.

Q. Well, what has been your experience? A. The man that has got a good location, you can undoubtedly go to him and sell him a pump. It is not necessary to give him one.

Q. Does that mean that you have not found, in your experience, or in the experience of your employees, that there are many persons who have locations, desirable locations, who cannot be persuaded to make an investment, or who have not the funds to 582 make an investment in an equipment of that sort? A. A. I may be pretty thick, but I do not get the point you have got in mind. Do you mean, say, John Jones has a good location here, and we are unable to induce him to spend the money to put in a pump there, because he has not got the money?

Q. Or is unwilling to make the investment? A. No; and we have found that John Jones, on the corner, who has a good location, if we go to him and interest him, and show him the advisability and the profit of installing a pump, somebody else comes along and says: "What is the use of your buying it? We will give it to you."

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Q. That is not exactly my question. You are assuming that he is meeting a competition between a person who wants to sell outright and a person who wants to lease. My question to you is this: Whether, in your experience you have found persons owning or occupying desirable locations along the road, throughout Pennsylvania, who, notwithstanding they have desirable locations, either have not the money, or are unwilling to invest it in the pump equipment with a view to furnishing oil and gasoline products to the public? A. I have not found any such cases as that. I do not believe that there is a case where a man owns a piece of property, and where he has good traffic advantages, where you can go to him and show him that with a certain investment he will get a return of ten or fifteen, or twenty or twenty-five per cent a month, that you cannot sell him. He will go around some place and dig up the money.

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Q. Do you personally endeavor to place these locations? A. Do I personally?

Q. Yes? A. No.

Q. Who does, with your company? A. We have about fifteen men that do.

Q. And they make their report directly to you? A. Yes.

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Q. Would such reports as they make cover that point? A. To some extent. If it involves a credit risk, it does.

Mr. Schekter: May I ask whether it is the intention of the Government to produce such men who have actual familiarity with the situation.

Mr. Zechiel: Not at all.

Mr. Schekter: Then we merely state that we shall take it up as a matter of defense or rebuttal. I have no further questions.

RE-DIRECT EXAMINATION by Mr. Zechiel:

Q. On the pumps which you have placed, sold, and through which your gasoline is distributed, do you have signs of any kind designating your gasoline? A. Yes, sir; in most instances, "Crew-Levick brand."

Q. And that is whether you have leased the pump—I believe you say you have no cases at all, now, where you have leased equipment? A. I don't think we have any leased equipment out at all.

Q. So that these signs are on pumps owned by the
587 retailers? A. Owned by the retailer, yes, sir.

Q. Is it not a fact, Mr. Custer, that there are a great many brands of gasoline being sold by competing oil companies, all of which are considered first-class gasoline? A. Yes. I might add to that that there are a number of companies selling the same gasoline under different brands. I mean by that there is a number of refiners around over the United States that have no marketing organizations, and they naturally must find a market for the gasoline they make, and they will sell it to the Jim Jones Oil Company, and he sells the gasoline under the "Cocoa Brand." They will sell it over to another Tom Smith Oil Com-
588 pany that sells it under some other brand, and when you get down the line you will find the gasoline coming from one refinery is sold under possibly four, or five or six brands—the same identical gasoline.

Q. Do you believe that the present practice of selling gasoline of different companies through the same oil tank equipment has really resulted in fraud upon the public? A. Fraud, as I understand it, is representing something to a man and then giving something of inferior quality. Most of the gasolines that are on the market have approximately the same gravity; they

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have approximately the same initial and end points, so there is really very little difference in the gasoline that is sold for motor cars. There is some difference, of course.

Q. So that, so far as the sign is concerned, it does not protect the public, in your opinion, one way or the other? A. Not a great deal, no.

Q. Leases and loans that are made by oil companies in your competitive field, are they made to large garages or large and small as well? A. I would say large and small.

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RE-CROSS EXAMINATION by Mr. Speer:

Q. If you were purchasing gasoline from some manufacturer for your automobile trade, would you not require a gasoline of a certain grade or quality to be furnished to you, suitable for that class of trade? A. Are you talking of me, now, as a consumer—if I am buying gasoline for my car?

Q. Yes? A. The average consumer does not ask anything about it—does not know anything about gasoline.

Q. No; and it is a fact that once in a while he gets a poor supply, does he not? A. Yes. A lot of the 591
time they get very bad gasoline that is not the fault of the oil company, that is, the distributing company, because there is a lot of unscrupulous garage people and unscrupulous dealers who will mix something else with their gasoline and sell it to the public, and sell it under your trade name and under my trade name, which we cannot control and cannot stop.

Q. That, of course, is a fraud on the public. There is no question about that? A. Yes.

Q. And every one who has a trade-mark, a brand, selling under that brand, naturally endeavors to pre-

vent the sale, under his brand, of an inferior grade of gasoline? A. As far as he can, yes.

Q. Because if he allowed that to be done, it would ruin the reputation of his gasoline, would it not? A. Yes.

Q. And the purpose in having a trade brand is to establish a reputation for it, so that people, when they see that brand, will be satisfied that they are getting a good grade, suitable for their purposes? A. That is the idea, exactly.

Q. Now, then, if you do not make it yourself, and
593 you want to keep up the reputation of your brand, if you buy it from some other manufacturer, you have got to test it and see whether it comes up to the specifications of the brand that you are selling, if you want to be sure to protect your trade? A. Certainly.

Q. Then, if you require the gasoline to be of a quality, the grade which you are selling, it of course does not make any difference whether you make it or whether you have somebody else make it, that is true, is it not? A. Yes.

Q. Is not that true of lubricating oils—that you have a formula under which they are manufactured, and that is your brand, and you can have any refiner make
594 your brand of oil according to your formula? A. Not necessarily so.

Q. If he is an honest man, and works out the formula properly, he will make the same kind as you make yourself. A. If it was made from the same crude and of the same viscosity, fire and flash test, and all that sort of thing, it would be just the same, or thereabouts.

By Mr. Nesbitt:

Q. Mr. Custer, what do you mean when you are talking about brands? What do you have in mind

when you have been talking about brands in connection with gasoline? A. The trade-marks that the different refiners have.

Q. The registered trade-mark? A. Yes.

Q. You have such a mark? A. Yes, sir.

Q. And you put a value on that mark in your own territory, do you not? A. Yes, sir.

Q. And you try to protect that mark? A. So far as we can, yes.

Q. If anyone attempted to make what you thought was an infringement of that mark, you would seek redress for that? A. Yes. 596

Q. No matter what the nature of that infringement might be? A. Yes.

Q. If you regarded it as an infringement of your mark, you would attempt to prevent it? A. Yes.

Q. If you were, yourself, driving through a strange territory, would you take any gasoline that you first saw the sign of, or would you choose your own gasoline? A. I, myself, when I am in a territory where I cannot get our own gasoline, take, usually, the first thing that comes along.

Q. But you take your own if you can get it? A. Yes.

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Mr. Nesbitt: That is all.

Witness excused.

G. W. LANE was thereupon called as a witness and having been duly sworn, testified as follows:

Direct-examination by Mr. Burdeau:

Q. State your name and address, please? A. G. W. Lane, Watertown, New York.

Q. What is your business? A. The oil business.

Q. What company are you connected with? A. The Northern Oil and Fuel Corporation.

Q. That company is engaged in the distribution of gasoline and other petroleum products? A. Petroleum products only.

Q. What territory does your business cover? A. We do business in Syracuse, and go north up around Plattsburgh, Elizabethtown, and work down east to Utica.

Q. Is your business confined to the State of New
599 York, or do you do business in some other state? A. I am confined to the State of New York.

Q. You do not go out of the State of New York? A. No.

Q. Who are your competitors in your territory? A. The Standard Oil Company and the Peoples Oil Company.

Q. Any others? A. No, sir.

Q. Does your company make a practice of leasing oil pumps and tanks, or loaning them to garage owners and other retail distributors? A. The Standard carries that system.

Q. Does your company do it? A. Yes.

600 Q. How long has it engaged in that? A. We were forced to go into the leasing of curb pumps, to save our business, due to the fact that the Standard leased curb pumps to most anybody that wanted to dispense gasoline, under a one dollar a year rental basis.

Q. When did you begin that practice—your company? A. About a year after starting in business.

Q. When did you start in business? A. 1914.

Q. So then, you began the practice of leasing pumps in 1915? A. We had to earn the money before we could do it.

Q. About how many equipments have you under lease, now, to your customers? A. About thirty.

Q. Did your company deliberate over this matter at any time before engaging in it—hesitate and consider this matter at all before it engaged in it? A. No, sir.

Q. What prompted your company to engage in the practice of leasing and loaning oil pumps? A. To save our business.

Q. Be a little more explicit about that, please. What had happened to your business? A. We probably would not have had any.

Q. You are certainly getting to the results all right, 602
but I want you to tell me the steps which led to the taking away of your business. What was happening that was taking the business away from your company? A. If we did not lease curb pumps?

Q. Yes? A. I just told you.

Q. Was it because some of your competitors were doing that? A. They were doing it.

Q. And the people to whom you had been selling gasoline would not purchase your product unless you put in these equipments? A. The situation was just this: A man was very foolish to put in three hundred, or four hundred, or five hundred dollars into a curb outfit and pay his money for it when he could get it 603
for one dollar a year. We have two systems in northern New York. The system we work to quite an extent is that we put in a curb outfit and charge one cent a gallon on the curb pump over and above the tank wagon price, and when said amount amounts to the amount of the purchase price of the curb pump, we issue a statement and make a billing out on the curb pump and receipt it in full, and the curb pump reverts to the lessee of the pump.

604 *G. W. Lane, Direct*

Q. You have not yet understood me. Your business is the selling and distribution of petroleum products? A. Yes.

Q. You are not primarily interested in the pump business? A. Not very much, no, sir.

Q. You told me you were forced to adopt the practice of leasing pumps? A. Yes.

Q. Was that because you had been losing customers? A. Yes.

Q. And was it because your customers were dealing with another oil company? A. Yes.

605 Q. What oil company was that? A. The Standard Oil Company and the Peoples Oil Company.

Q. About how many customers do you think declined to deal longer with your company because of receiving equipment from another company? A. It would be quite a number. I would not be in a position to tell you just the number of people that we might have lost if we had not entered into competition.

Q. Has it happened recently that you have lost a customer because of this practice? A. No; we have not lost anything recently.

Q. Is it because you have installed the same kind of
606 equipment yourself? A. We installed the Bowser curb pump and the Wayne tank outfit.

Q. You have given some consideration to this question as a matter of business economy, have you? A. Yes, sir.

Q. Is it your opinion that it is sound business to rent or lease these pumps to retail dealers?

Mr. Speer: I object to that as incompetent, immaterial and irrelevant.

Examiner McCorkle: The objection is noted. Proceed with the answer.

The Witness: It works a hardship on the jobber where he would have to make an expenditure of four hundred or five hundred dollars in thirty-five or forty different places, depending on the territory he is covering.

By Mr. Burdeau:

Q. By "jobber" you mean people engaged in business like yourself? A. Yes, sir. We are jobbers.

Q. Your objection is that it works a hardship of the jobber? A. Yes, sir.

Q. And as I understand it on account of the excessive investment? 608 A. Yes, sir.

Q. Is there a fair return on that investment? A. Why, if you have the money to make the investment and you can ride along with it long enough to obtain back a profit on the sale of your gasoline to cover your overhead and your expense of installing your outfit, then you have velvet again; you would have a curb outfit and a station which would belong to yourself, and perhaps would not be disturbed by anybody else. Naturally, then, you would realize a net gain on it. But so many pumps are installed where a party wants to buy, maybe five thousand gallons of gasoline a year, or ten thousand gallons, and it is a 609 very poor investment. However, we are forced to put a curb pump and tank in to that buyer, whether he buys two thousand or one hundred thousand gallons, if we want to hold him as a customer.

Mr. Burdeau: I think that is all.

CROSS-EXAMINATION by Mr. Speer:

Q. Do you sell your gasoline under a trade-mark or brand? A. Yes, sir.

610 *G. W. Lane, Cross*

Q. Do you endeavor to get your gasoline to the automobile owner—do you deal with him direct? A. I deal mostly through the local dealer.

Q. That is, your practice before you began leasing the pumps, was not to attempt to sell to the ultimate consumer, but to sell to the local dealers? A. We sold to local dealers and consumers, both.

Q. You mostly sold to the dealers? A. Yes.

Q. Did you have tank wagons? A. Yes.

Q. You owned the tank wagons, of course? A. Yes.

611 Q. Now, what other method do the companies have of distributing their gasoline under their trade brand to the consumers besides having these little curb filling stations? A. The Standard Oil Company will go to a private owner and put in a gasoline outfit, in some instances at a rental of five dollars a year, and take care of that at the regular wholesale price, regardless of the dealer. Our system, up in our section, is that we are overselling the Standard market one and a half cents a gallon. We cannot afford to live under the same prices they do, and also give certain protection to the dealer which we figure he is entitled to, and does not get under the Standard Oil system, and does get un-

612 der the Northern system.

Q. You are still speaking of these small pumping outfits. What other method is there of bringing the product to the consumer besides these little pumping outfits? A. You have to bring it to the consumer with a tank wagon.

Q. Do they have any what they call service stations in your territory? A. Yes.

Q. What are those? A. Mostly owned by different people that take them themselves.

Q. The Standard Oil Company has not erected any of those large serving stations in your district? A. No, sir.

Q. Have any of the oil companies done that? A. No, sir.

Q. If they had those service stations erected, they would sell the automobiles their own gasoline at those service stations? A. Yes.

Q. They would not sell anybody else's? A. No.

Q. You would not expect to sell your gasoline to them at those service stations, would you? A. No.

Q. They establish them for the purpose of selling their own gasoline? A. Yes.

Q. Is it not more expensive to put in these large service stations which you see in many places, so as 614
to get the gasoline to the consumer, than it is to put in these little pumping outfits? It would cost more money, would it not, to erect those service stations than it does to put out a few of these pumping outfits? A. Not if you figured on the net earning of those stations.

Q. Of course the stations would earn more, but of course their investment is more? A. Yes.

Q. But if you were compelled to do that in order to get your share of the business, it would require a considerable investment on your part, would it not? A. It would, and it would not. We would realize, if we had a bungalow filling station, such as you refer 615
to—we would naturally sell more gasoline, and we would not have to sell it at wholesale. We would market at retail. Figured that way, your curb outfit is more expensive than your filling station.

Q. How does it come if that is true that these companies prefer to use small pumping outfits, instead of erecting large service stations? Do they not do it because it is a cheaper way of getting it to the public? A. I hardly believe that.

Q. They do get the business at these little pumping outfit stations? A. They get the business there, yes.

616 *G. W. Lane, Cross*

Q. And you are compelled to adopt the same system in order to get the business? A. Yes.

Q. Otherwise it would go away from you? That is a fact, is it not? That is why you put them in, and that is why you began the leasing system—so that you could have your share of the business? A. The filling stations are good investments.

Q. What do you mean by "filling stations"? A. I mean just what you are referring to—bungalow filling stations.

Q. Where a man drives in with his automobile? A.
617 Yes.

Q. You have got to get the property and you have got to erect a building there? A. Yes.

Q. And you have got to have space to accommodate more than one automobile at a time, if you are going to have much of a station, have you not? A. Yes; but your net gain would be far greater.

Q. But when that station was established, the owner of it would be selling his own gasoline, and you would not get any of that trade, would you? A. That might work out that way, but we might build stations, too, and sell our own gasoline.

Q. That would cost you money, the same as pur-
618 chasing pumps, would it not? A. Yes; but you gain, on those bungalow stations, on the curb.

Q. You think they are more profitable? A. If we had bungalow stations, we would not be selling gasoline at twenty-five and a half cents. We would be selling at twenty-eight cents, unless we were forced to sell at twenty-five by the Standard Oil or some other company.

Q. Then if, instead of these curb outfits, if the marketers put up these bungalow or service stations, you say gasoline would be selling higher? Is that what you mean? A. We would be selling to meet competi-

tion. The price at a filling station is higher than it is off the tank wagon.

Q. You say it would sell higher at those service stations, would it, according to the way you figure? A. You would have to sell higher.

Q. And the public would pay more for it? A. The public would pay the regular retail selling price.

Mr. Speer: That is all.
Witness excused.

620

EDWARD J. SUOR was thereupon called as a witness and having been duly sworn, testified as follows:

Direct-examination by Mr. Burdeau:

Q. State your name and address, please? A. Edward J. Suor, Buffalo, New York.

Q. What is your business? A. Distributor and jobber of petroleum products.

Q. Are you connected with any company or corporation? A. Yes; a corporation.

Q. The Suor Oil Company? A. The Suor Oil Products Corporation. 621

Q. In what territory does that company do business? A. Western New York, Erie and Niagara counties.

Q. It does not go outside of the State of New York? A. No.

Q. Who are the competitors of your company? A. The Standard Oil Company of New York, the Sinclair Refining Company, Elmer E. Harris & Company, the Kendall Refining Company, the Pease Oil Company, the Fails Lubricating Company.

622 *Edward J. Suor, Direct*

Q. Does your company make a practice of leasing and loaning oil pumps and tanks to retail distributors and dealers? A. We do not make a practice of it, no.

Q. Have you, in any case, leased or loaned pumps and tanks to retailers? A. Only in such cases that we were obliged to do it in order to hold our trade.

Q. When did you begin to do that? A. 1916.

Q. What prompted your company to engage in that practice? A. We did not engage in the practice. We only did it in certain cases in order to hold the busi-
623 ness, where we were supplying a certain trade and efforts were made by the other companies to install on the lease basis the tank and pump; and in such accounts as we thought were good accounts, and would make a profitable return, we kept those. Others we let go.

Q. You are referring to accounts which you already had? A. Which we already had.

Q. About how many installations have you outstanding now? A. Not over ten or twelve.

Q. And those were all given or leased to men or concerns that had previously been buying your products? A. Absolutely.

624 Q. What companies, if you know, offered to install tanks and pumps in these cases that you have referred to? A. The Sinclair Refining Company, the Standard Oil Company, Elmer E. Harris Company, the Kendall Refining Company.

Q. You have given some consideration to that as a business problem, a matter of business economy? A. I have given serious consideration to it.

Q. Do you regard that as a good business proposition?

625

Mr. Speer: That is objected to as immaterial, irrelevant and incompetent.

Examiner McCorkle: The objection is noted. Answer the question.

The Witness: Absolutely not.

By Mr. Burdeau:

Q. Will you state the reasons why you do not regard it as a good business proposition? A. First of all, the investment that would be necessary to meet that kind of competition. In our district, within the last two years, we have had installed between three hundred and four hundred pumps and tanks—I would say five hundred. Figuring on our proportion of that, of prospects which we had a chance of getting, had we met that competition, it would have cost upwards of seventy-five thousand dollars to one hundred thousand dollars.

626

Q. And what is the total capital of your company? A. One hundred thousand dollars.

Q. There is no fair return on capital so invested, is there? A. In some cases; but mostly I would say no.

Mr. Burdeau: That is all.

627

CROSS-EXAMINATION by Mr. Speer:

Q. You seem to have quite a lot of competition up in your territory? A. We have got plenty of it, without the pumps and tanks.

Q. I take it from what you say that the competition has been increasing there of late? A. Considerably and consistently.

Mr. Speer: That is all.

Witness excused.

628 *Walter H. Goodrich, Direct*

WALTER H. GOODRICH was thereupon called as a witness, and having been duly sworn testified as follows:

Direct-examination by Mr. Zechiel:

Q. State your name and address, please? A. Walter H. Goodrich, corner of College and George Street, New Haven, Connecticut.

Q. With what concern are you connected? A. Walter H. Goodrich & Company, Incorporated.

Q. What is your business? A. The sale and dis-
629 tribution of petroleum and its products.

Q. How long have you been engaged in that business? A. Since the first of January, 1906.

Q. Had you had any experience prior to that, yourself, in the oil business? A. Not on my own account, but as an employee of the Standard Oil Company, about ten years previous to that.

Q. That is, the New York corporation? A. I think it was the Standard Oil Company of New York at that time.

Q. What were your duties when you were employed by the Standard Oil Company of New York? A. I was first employed as a bookkeeper, at nine per. When
630 I left them, I was agent, employed at New Haven, in charge of New Haven and four other stations.

Q. That was the distributing end? A. Yes.

Q. Since 1906 you have been connected with your present organization? A. Yes.

Q. What are your duties in that company? A. At the present time?

Q. Yes? A. I am the president, treasurer and general manager of it.

Q. What is the territorial extent of your business? A. The City of New Haven and the immediate vicinity.

631

Q. You are acquainted with the distributing units, the various garages and other retailers of your product? A. Oh, yes.

Q. Do you, in connection with your business, handle pump equipments? A. Only as a convenience to the trade, as it suits our relations with them. We handle it merely as a convenience for them.

Q. Do you lease and loan such equipments? A. Yes; lease them.

Q. You lease them? A. I say we lease them. We put out these tanks and pumps. We do not bother anybody to sign an agreement, because we just take the chance; that is all.

632

Q. But you do have an understanding that they are to use your gasoline? A. It is put out with the purpose of getting them to buy our gasoline.

Q. Do you sell any such equipments? A. Yes; when it suits the customer, we procure the equipment and sell them, on whatever terms suit them. In fact, we try to educate them to believe that they are better business men when they buy their own outfits.

Q. How long have you been leasing such equipments? A. Oh, I should say two years.

Q. Prior to that time you had been selling? A. Yes.

633

Q. What was the occasion of your changing your practice from the straight sale policy to the lease and loan? A. It was necessary to maintain our output that we do something of that kind.

Q. More specifically, in that respect? A. Our competitors loaned these equipments out to the trade and our customers came to us and said that they could get these on a nominal basis of one dollar a year and they gave us the privilege of supplying them with equipment or they would take up with the other proposition.

634 *Walter H. Goodrich, Direct*

Q. Did you lose any customers because of this practice, because you refused to install them? A. That is a hard matter to say. We have lost trade since this practice was started.

Q. You mean you don't know that the loss of any particular part of your trade was due directly to this practice of leasing and loaning pumps? A. We sought to forestall anything of that kind as best we could. There is no doubt but what we would have lost trade.

Q. Because of this practice, you mean? A. Oh,
635 yes.

Q. Was that an appreciable amount of business that you lost in that way? A. Well, the increase in the output of gasoline and the quantity used has been so great that when you pin the matter down to a matter of gallonage, it would be hard to answer that question.

Q. I am not speaking with respect to gallonage, at all. I am speaking with respect to customers. A. That is a very difficult matter to answer intelligently. In this oil business things change overnight, and five years ago we were marketing gasoline under an entirely different scheme than we are today. We
636 were, at that time, selling gasoline to the consumers direct, when they bought it, and to the garages to sell again. Then the demands of the automobile trade were such that the curb pump came into existence and we simply followed out the demands of the trade and furnished the pumps where it was necessary to maintain our trade, after the practice had been started by other companies.

Q. From your experience do you believe that the practice of leasing and loaning these pumps under those agreements and understandings about which numerous witnesses have testified is a sound business practice?

637

Mr. Speer: Objected to as immaterial, irrelevant and incompetent.

Examiner McCorkle: The objection is noted. Go ahead and answer.

A. To give you a direct answer on that is quite a proposition. It has its merits and it has its demerits. From my standpoint as an independent oil man of small means, I should say it was a bad practice. From the standpoint of the Standard Oil Company, seeking to find an outlet for their immense gallonage, I should say it was a mighty good practice; also from the standpoint of the Gulf Refining Company, with unlimited capital, it is the only thing to do, looking at it from their standpoint; but to get back to my own self, my own company, I say that it is a practice that eventually will give us serious difficulties.

638

CROSS-EXAMINATION by Mr. Speer:

Q. You say you lost some customers, but in all probability you acquired other customers? A. Well, if you desire me to tell you some of the things that I have done to maintain our output, I would be glad to do it.

639

Q. I do not care to go into the details. I do not think it is competent. I would be glad some time when we have time to talk it over. It would be very interesting, but I want just that one fact: While you did lose customers by this practice, you did, also, gain customers by it? A. No; I will not say that. What we did was done to forestall the possible loss of trade and by judicious location of the outfits that were put out, we thought not only to guard against the loss of gallonage but possibly to increase it.

Q. To get new customers, in other words? A. Yes, we have got to beat the game. If we don't, they will beat us.

Q. That is what competition means—that each fellow has to hustle or the other fellow will get his trade? A. Yes.

Q. And you have plenty of competition in your territory? A. Lots of it.

Q. And it is increasing instead of diminishing, is it not? A. Very much so.

Q. And has not this curb pump system, which
641 enables them to get their product in this cheap way, under their brand, to the public—has it not increased the competition? A. Has it increased the competition?

Q. Yes. A. No, it has not.

Q. Are there not more companies operating than there were before? A. No; there might be in our particular field.

Q. I am speaking of your field. A. But the companies, the class of companies operating and furnishing us with competition today are large companies which have been existing for a long time.

Q. Certainly. A. And they are simply branching
642 out, looking for the little plums we fellows have gathered up.

Q. Some years ago they did not compete so much? They occupied certain localities, and now they are coming in and competing in every locality? A. As a development of the oil business.

Q. So that, as a matter of fact, now, under this pump leasing system, there are more companies operating in your territory than there were before? A. Only one company, the Gulf and the Standard Oil and ours were there, and The Texas Company within the last two years. I beg your pardon, I will cor-

rect that. The Texas Company came to New Haven four years ago and built a large filling station two or three months after I built mine. I got there first, with the best corner. They tried to buy it, but I would not sell.

Q. Did they, by building that filling station, or service station, or whatever you call it, take away some of the trade that you would otherwise have been able to take care of? A. Well, they had a very extensive advertising system or practice and by means of this system of advertising they undoubtedly influenced some of the trade their way, but no more than we 644
could help. We believe in going after them.

Q. So that that method of doing business, by establishing service stations, will take away the business from you just as well as the loaning of pumps? A. I should hate to see all the money they have invested there go without bringing them some return.

Q. Well, you are all doing pretty well, are you not, in spite of all this competition? A. Well, if a man is of a complaining kind, and weak kneed, he had better stay out of the oil business.

Q. So far as competition is concerned, there never was a time when competition in the oil business was as keen as it is today. Isn't that a fact? A. I think 645
you had better leave that question unanswered. My history of the oil business dates back 25 years and I have seen some mighty active times.

RE-DIRECT EXAMINATION by Mr. Zechiel:

Q. What is the fact about it, Mr. Goodrich—this practice of leasing and loaning these equipments, whether it does or does not tend to too frequent duplication of curb pumps, unnecessarily so, so far as the convenience of the public is concerned? A. That

646 *Walter H. Goodrich, Re-direct*

is a fact that is very apparent to any business man. For instance, the Gulf Refining Company's agent on my premises made the statement that they had put out as leased equipments, $60,000 worth of outfits. That is twice the authorized capital stock of my company. That has been done this year.

Mr. Nesbitt: I want to object to that answer. I do not really believe that is competent, at all.

Mr. Burdeau: That is a declaration against the interests of the parties to this proceeding.

647

Mr. Nesbitt: The witness states what the Gulf Refining Company's agent told him about the output of these installations.

The Witness: That is a part of my answer.

Mr. Burdeau: But the Gulf Refining Company is a respondent here, and anything said by an agent of that company is admissible against that company.

Mr. Schekter: Provided the agent had authority to make such statements.

Examiner McCorkle: The objection is noted and you can have the benefit of it later. Proceed.

648

Mr. Speer: I object to it, anyhow, as immaterial and irrelevant.

Examiner McCorkle: The objection is overruled. Proceed.

By Mr. Zechiel:

Q. Go ahead, Mr. Goodrich. A Answering your question directly, that is an illustration. It must be apparent to you that they do put them out promiscuously, very much so, and not in line with any other

policy than to absolutely control the trade, so far as they are able, regardless of reasonable investment.

Q. And it is not a question of whether the public needs more pumps or pump stations for distributing purposes or not? A. They are more common up there than newsboys.

Q. Answering my question specifically, one way or the other, just to clear up the record, is it or is it not? A. What was the question?

(The reporter repeated the question as follows):

650

"Q. And it is not a question of whether the public needs more pumps or pump stations for distributing purposes or not?" A. No.

RE-CROSS EXAMINATION by Mr. Speer:

Q. Nevertheless, in order to get the business, you have to put in these filling stations, nowadays? A. You ask me questions that call for detailed answers.

Q. Isn't that a fact, that that is why you do put them in—because it is necessary for you to do that in order to hold your business? A. The filling station, judiciously located—

651

Q. I mean these little pumping stations. A. You mean the curb outfits?

Q. Yes. A. And your question is what?

Q. I say that the reason you are putting them in and installing them, as you say you have done, is because it is necessary for you to do that in order to hold your business? A. That is true, but we do not locate one pump so that it will sap another one.

Q. Of course that is a matter of business judgment? A. That is the policy of your company, however.

Q. This appears to be true, that the public are patronizing these little pumping outfits? A. Oh, they put them in front of drug stores and grocery stores.

Q. And the public patronize them, do they not? A. Oh, when their regular filling stations are closed up, and they cannot get in, if they can find one of these fellows, they will ring the bell and get him out of bed and try to buy gasoline.

Q. I understood it was the other way yesterday. So far as establishing these large service stations like you establish and spend a great deal of money on,
653 it was absolutely unnecessary for The Texas Company to come in there and build another one? You could have taken care of the trade? A. Oh, I would like to have had the chance.

Q. So that there was a duplication of equipment that was really unnecessary? A. Oh, yes.

Q. Isn't that true of competition in any line of business—that it leads, sometimes, to a duplication of equipment that might be avoided? A. Yes, quite often.

Q. But, after all, competition is not a bad thing for the public, is it? A. Certain kinds of competition are good.

654 (Witness excused.)

J. H. PORTEOUS was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. State your name and address, please. A. J. H. Porteous, Middletown, Conn.

Q. With whom are you connected? A. The Valley Oil Company.

Q. What is your position with that company? A. I am proprietor, owner.

Q. Is it an incorporated company? A. No, sir.

Q. You are sole owner of the company? A. Yes, sir.

Q. How long have you owned that company? A. Seven years in October.

Q. Prior to that time did you have any experience in the oil business? A. Yes, I was with the old school, the Standard Oil Company.

Q. That is the New York corporation? A. Yes.

Q. How long had you been with the New York 656
corporation prior to that? A. I worked for the Standard about nine years.

Q. Your present business is that of a wholesale or jobbing business? A. Yes, gasoline, kerosene and lubricating oils.

Q. What is the territorial extent over which you do business? A. We operate over a very small territory—Middletown and vicinity, Middlesex County.

Q. In connection with your business do you also handle oil tanks and pumps? A. Yes, we handle them; we sell them if we get a chance.

Q. Do you lease or loan such equipments? A. We do. We do not lease them; we put them out and 657
sell our gasoline to them.

Q. That is, you have an understanding with the parties with whom you place such equipments, that they use your gasoline through such equipment? A. Yes.

Q. How long have you been engaged in that sort of practice? A. About two years.

Q. Are you also, at the present time, selling such equipments? A. We will, if we get a chance, sell one.

Q. As a matter of fact, do you sell any of them? A. We have sold one recently, yes.

Q. In the past two years, since you have been loaning them out, have you sold any such equipments? A. No, we did not sell any.

Q. Prior to that time had you been selling them? A. No; we never did sell any. We have recommended the people that wanted the tanks to the tank makers, and we have had the tank makers call on the customers and sell them the tanks.

Q. That was prior to the period of two years ago? A. Yes.

Q. What was the occasion of your change from
659 the prior practice to the present practice of loaning out such equipments? A. We had to change or else lose all our customers that we did have; that is, those that used to handle gasoline at that time, in small outside tanks, 150-gallon tanks, or probably 200-gallon tanks, on top of the ground. In order to hold the business, we have had to put in a tank or our competitors would put in a pumping station for them.

Q. By pumping station you mean what? A. That is a pump and tank.

Q. When you say "for them," you mean they would put them in at a nominal consideration? A. They
660 would put them in free of charge, or lease them at one dollar a year.

Q. Have you ever lost business for your concern because you refused to install such equipment for a nominal consideration? A. Yes and no. We have lost some.

Q. You say "yes and no." Let us have that more definite. A. We have sold men that used to own their own tanks, a small inside pump, and when we refused to put in the outside pump for them, the Standard put one in and we lost the business.

Q. Was that of frequent or rare occurrence? A. It was not very frequent.

661

Q. In your community do the retailers have more than one such equipment installed in their place of business? A. No, they do not.

Q. Do you know of any cases at all where they have more than one? A. Not in my territory.

Q. From your experience in the jobbing of your products, do you think that the practice of leasing and loaning these equipments for a nominal consideration, under these so-called tying conditions, is a sound business practice?

Mr. Speer: That is objected to as incompetent, irrelevant and immaterial. 662

Examiner McCorkle: The objection is noted. Proceed.

A. No, I do not think it is a sound business practice.

CROSS-EXAMINATION by Mr. Speer:

Q. These outside tanks that you say the dealers owned, to whom you were selling gasoline before this system came in, were large tanks which they had outside the garages, as I understand, and they connected with a pump inside? A. As a general rule they used to draw it in 5-gallon cans. 663

Q. Draw it out in a can and pour it into the automobile? A. Yes.

Q. These modern tanks and equipments have the tank buried underground? A. Yes.

Q. That keeps it cool and there is less evaporation? A. It keeps it more on a steady temperature, yes.

Q. And this old system of having the outside tank has been entirely discontinued, has it not? A. It has.

664 *Nathan Wilkes, Direct*

Q. Nobody uses that? A. Not to sell. Some of the owners do have them.

Q. So that this use of these outfits, consisting of a small tank and a pump, has become the recognized method of retailing gasoline to the automobiles? A. Yes.

Q. And everybody uses that method, when they have their own pump or if it is leased to them? A. They do, yes.

Mr. Speer: That is all.

565 (Witness excused.)

NATHAN WILKES was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. State your name and residence. A. Nathan Wilkes, Hartford, Conn.

Q. With what concern are you associated? A. The Singer Oil Company.

666 Q. What is your connection with that company? A. I am treasurer.

Q. How long have you been connected with that company? A. Since 1914.

Q. Prior to that time did you have any experience in the oil industry? A. Not myself. The other people in the corporation had.

Q. But not you personally? A. Not myself personally.

Q. What is the general business of your company? A. The marketing of petroleum products.

Q. What is the general territorial area over which you do business? A. Hartford and vicinity; practically Hartford County. That is about all.

Q. In connection with your business do you handle oil tanks and pumps? A. We have given out, lately, quite a few.

Q. You say lately? A. Within a couple of years.

Q. Prior to that time had you handled them in any respect at all? A. From 1916 we have had two or three filling stations that we employed men for our own use; that is, we have not given any equipments. We own the equipment ourselves.

Q. In the last two or three years you say you have? A. We have had to loan some for one dollar a year, several equipments. 668

Q. You say you had to loan them. Just what do you mean? A. I saw that we were losing business and if we did not put out a few of these equipments we would lose business; we had to do something to hold some of the business, so we have done it and given out these equipments to hold our business.

Q. Why were you losing the business? A. To give an illustration, we had some people that we had done business with and they came around and said that the Standard Oil Company offered them an equipment free of charge, or for one dollar a year, and they would give me the preference because they had done business with me, but at that time, an 669 equipment looked so big to us that we did not see our way clear to give it to them and we lost them. There were several of them we lost in that way.

Q. Did you lose an appreciable amount of your business because of those conditions? A. As far as I know, these people, if I had furnished them the equipment, I could have sold—I could have sold probably two or three hundred thousand gallons of oil, but we did not see our way clear that we could do it.

670 *Nathan Wilkes, Direct*

Q. Would you lease or loan such equipments now, if your competitors were not doing so? A. Not unless I am compelled to, certainly not.

Q. From your experience in this marketing of gasoline, do you think that this practice of leasing these equipments under these circumstances and conditions, is sound business practice?

Mr. Speer: Objected to as immaterial, irrelevant and incompetent.

Examiner McCorkle: The objection is noted. Proceed with the answer.

671

A. It seems to me if the owner of each equipment would own the equipment, naturally I would have a chance at it, no matter who sells it to him, but, at one time or another, I could probably get around him and get some of his trade; but by being tied up to another company, of course, I stand no chance to sell him any except these equipments that I put out myself.

Q. Referring to the question again, is your answer yes or no?

(The reporter repeated the question as follows):

672

"Q. From your experience in this marketing of gasoline, do you think that this practice of leasing these equipments under these circumstances and conditions is a sound business practice?" A. I would not exactly like to answer that question. That is, I feel if I was capable, or able, maybe I would go on with these, because in the end it would be profitable, probably, for myself; but not being able to put out as many pumps as that, of course, it is different.

Q. Speaking from the point of view of your own company, under present circumstances, what is your answer?

Mr. Speer: We object to that as incompetent and irrelevant.

Examiner McCorkle: The objection is noted.

A. I would not think it is a fair practice, because it curtails competition.

CROSS-EXAMINATION by Mr. Speer:

Q. You do not manufacture gasoline? You have no refinery? A. No.

674 Q. You are what is called, usually, a jobber? A. A jobber; yes, sir.

Q. Before this leasing practice began, or before you began leasing pumps, you say you had several filling stations which you owned yourself? A. Two or three, yes.

Q. With the same kind of equipment? A. Yes.

Q. And you employed someone to operate them for you? A. Sure.

Q. And to sell your gasoline through those? A. Yes.

Q. You controlled those filling stations absolutely and nobody else could sell any gasoline to those stations? A. Not likely. 675

Q. When other companies began to lease and loan equipments, and it was necessary for you to put in an equipment in order to hold the trade, why didn't you put in a station of your own, similar to the several that you had? A. Well, there are two reasons why I did not. When I put in the first filling station myself, there were very few filling stations then, that is, curb stations, and we thought it was a good business policy to make one of them; but since the practice has begun of giving out pumps and tanks, they began to be so numerous that it

practically did not pay any more, the investment, for the amount of business that we were getting.

Q. In other words, it is cheaper to purchase the equipment and install it and loan it in this way than it is to establish a station of your own as you had been in the habit of doing before? A. I do not know whether it is cheaper, but we have seen that, as I said, the pumps were so numerous and the scarcity of help was so marked within the last couple of years or so, that it was practically impossible to run them.

677 Q. So that instead of putting in these filling stations, owned by yourself, where you would control the purchase of gasoline, you consider it a better policy and a necessary policy, on that account, to loan the equipments? A. It was a necessary policy, not a better policy, but a necessary policy.

Q. It is a cheaper method, is it not? A. I do not know how cheap it is. To us it seemed pretty costly.

Q. It evidently was a cheaper or more easily done thing than to own the station yourself, or else you would have continued your older method. A. I have still these three filling stations.

678 Q. If the companies that are competing with you, instead of loaning the tanks as they are doing, had put in a filling station like you have, employing men to represent them and sell the gasoline, it would have had the same effect in taking your trade, would it not? A. I don't know.

Q. You could not sell your gasoline to that filling station, could you? A. Certainly not.

Q. Any more than you can to the one where they lease the pump? A. No, sir.

Mr. Speer: That is all.

679

By Mr. Nesbitt:

Q. Are there any other jobbers in the oil business around Hartford and in that neighborhood? A. Yes, there is The Texas Company and the Gulf.

Q. I am referring more to jobbers. A. No, sir; none.

Q. You are the sole jobber in Hartford? A. As far as I know.

Q. There are jobbers covering the territory next to you? A. There is, ten miles from Hartford, at Manchester, there is the Valvoline Oil Company.

680

Q. I am referring more to the jobbing. A. There are not any jobbers in Hartford.

Q. Does your territory extend to Middletown? A. We never worked there.

Q. But does your territory border on the territory covered by the Valley Oil Company? A. As I say, we never went to Middletown, so I don't know. It is only twenty miles, but we never went there for any business. We just take care of Hartford and a few little towns around Hartford, that is all. We have not gone as far as Middletown.

By Mr. Speer:

681

Q. You just started in this jobbing business in 1914? A. Yes.

Q. And this system of leasing and loaning pumps was in vogue in this country before that time, was it not? A. Not very much. I do not recollect of any tanks and pumps being out at that time.

Q. Not in your community? A. Not in our community. There may have been a few pumps inside the garages, but none outside, not on the curb or street.

Q. Is it not a fact that this jobbing business, such as you are engaged in is quite a recent development?

682 *George E. Buck, Direct*

A. Why, I don't know whether it is recently or not. All I know is that we are in it since 1914. I don't know how recent it is.

Mr. Speer: That is all.

(Witness excused.)

Examiner McCorkle: We will adjourn at this point until tomorrow morning at 10 o'clock.

683 (Whereupon, at 4:45 o'clock P. M., an adjournment was taken until tomorrow, November 22, 1919, at 10 o'clock.)

New York, N. Y., November 22, 1919,
10:00 o'clock A. M.

Met pursuant to adjournment.

Appearances as before.

Examiner McCorkle: Proceed, Mr. Zechiel.

Mr. Zechiel: I will call Mr. Buck.

684 GEORGE E. BUCK was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. State your name and address, please. A. George E. Buck, Palmer and Worcester, Mass.

Q. With what concern are you associated? A. E. A. Buck & Company, Incorporated, and E. A. Buck and Company.

Q. Two different companies? A. Yes.

Q. What are your positions with respect to those companies? A. I am president and treasurer of

685

E. A. Buck & Company, and owner of E. A. Buck & Company, Incorporated, and owner of E. A. Buck & Company.

Q. How long have you been in the gasoline business? A. Thirty or forty years.

Q. You retail or wholesale gasoline and refined oil and lubricating products? A. Wholesale everything in the petroleum products line.

Q. What is the general territorial extent of your business? A. We have covered practically all of New England with our general lubricating business and Worcester, Milford, Webster, Palmer and Greenfield with our gasoline output. We have now sold to the Tidewater Oil Company all of our oil business except in Connecticut; I might say all that we have in Massachusetts.

686

Q. You still have a branch in Connecticut? A. I am interested with my brother at Willimantic, Connecticut, in the oil and grain business; more particularly grain.

Q. In connection with your business, when you were still operating as a jobber of gasoline, did you handle oil tanks and pumps? A. Yes, sir.

Q. Did you sell those equipments? A. We sold equipments; yes, sir.

687

Q. Did you also lease and loan such equipments? A. Yes, sir.

Q. Were you selling those equipments at the time that you sold out to the Tidewater people? A. When we could, always.

Q. And you were also, at that time, leasing and loaning equipments? A. Yes, sir.

Q. How long has your present company been engaged in business—I mean the company you have just sold out to the Tidewater Company? A. I could not tell you. The Tidewater must be a concern that has been in trade—

688 *George E. Buck, Direct*

Q. Not the Tidewater. I am speaking with respect to the business you sold to the Tidewater. A. That is very recently. They have gone into the jobbing, you might say into the wholesaling to the garage trade; they have lately gone into that, within two years. You mean the Tidewater?

Q. No, I am speaking with respect to your own interests; how long had you been operating your own interests that you sold to the Tidewater people? A. Oh, up to September 15 of this year.

Q. And prior to that time for how long? A. Be-
689 tween 30 and 40 years.

Q. And during that time you had been selling refined oil and gasoline constantly, had you? A. Practically; yes, sir.

Q. How long had you been selling pumps in connection with your business? A. Well, we have sold pumps probably for 20 years; not the filling pumps that we get nowadays, but we have always jobbed more or less of that line of stuff.

Q. And about the time the curb pump came along you started handling it? A. Well, we held off approximately two years before we began to loan.

Q. I am talking about the selling. A. We have
690 sold them ever since they were made.

Q. You say you held off for two years. About what date was it that you began leasing or loaning? A. Approximately six years ago, that we started in to loan equipment.

Q. What was the occasion of your starting to loan those equipments? A. Because we had to.

Q. That might be a conclusion. Will you just state the facts? A. The facts were that at Worcester —I will speak of that because of its being about where the game started with us in the loaning of equipment, we had quite a little circus with our big

691

friend, the S. O. Company. They were the only ones in there at that time and they started in to loan equipment. We held off for approximately two years. Probably we had two-thirds of the trade of the City of Worcester up to the time they began to loan equipment. I think it is safe to say that we had two-thirds, and I think we had more, but the loan equipment looked like a very big proposition and we did not want to get into it: we did not think there was any need of it, and we held off a year and a half or two years before we went into it and then we should not have gone in if we had not be- 692
gun to lose customers.

Q. How much business had you lost because of the practice of your competitor of that sort? A. Probably there was not, at that time, one filling station then where there are twenty now. We may have lost six or eight, but the loss of six or eight six years ago, in customers, made a bigger dent than it would to lose half a dozen new fellows coming along now.

Q. Would you say the loss of your business because of that practice of your competitor was a substantial loss? A. Well, yes and no. Of course, the business was growing.

Q. I am speaking, though, of just the individual 693
loss of business. I am not speaking of the comparative loss of business. A. Why, it was a loss, a considerable loss, of course.

Q. And your practice of leasing these equipments was for the purpose of meeting that competition? A. That is why we loaned them, yes.

Q. What is the amount of your capitalization? A. Seventy-five thousand dollars, of E. A. Buck & Company, Incorporated.

Q. And the other company, about how much have you invested in it? A. Well, it is rather hard to

694 *George E. Buck, Cross*

tell; perhaps a hundred thousand dollars or a hundred and twenty-five thousand dollars. That I could draw from if I had to.

Q. From your experience in the retail of refined oil and gasoline, do you think the practice which you have just described is a sound business practice?

Mr. Speer: We object as incompetent, irrelevant and immaterial.

Examiner McCorkle: The objection is noted. Proceed.

695 A. Why, yes, a good practice for the fellow who has got the money to do it with. He is dead sure to get the business if the other fellow cannot meet him.

Q. By "the other fellow" you refer to the companies with small capitalization and small means? A. Well, I think they have to fall out of the game.

CROSS-EXAMINATION by Mr. Speer:

Q. Does it not require less capital, Mr. Buck, to buy these little curb pumps and install them than it would to build a large service station into which the
696 automobile people would have to drive in order to get their gasoline? A. Yes, probably.

Q. So that, as a matter of fact, this method of getting your gasoline to the consumer is less expensive than if you established service stations in the cities? A. We have gone into the service station end but very little, so that I am not very conversant with it.

Q. You did not go into that, either? A. Not but very little; I think we have five filling stations.

Q. A great many large companies, who are marketing large amounts of gasoline and have a particular brand and are bringing their product to the con-

sumer, do build those large filling stations in the large centers of trade? A. Yes.

Q. And by advertising their product, endeavor to induce the automobile people to drive in and fill their machines in their stations? That is a fact? A. Yes, sir.

Q. And that costs more, really, in proportion to the amount sold, as a rule, than to buy and install these little curb pumps? A. I know some of the plants are very expensive.

Q. The loaning of these curb pumps has caused a great many more of them to be installed in Worcester and that vicinity than would have been done had the pumps and equipment not been loaned? A. Yes, quite likely. 598

Q. Now, at the time this loaning began you say you and the Standard Oil Company of New York were the only people that were competing in that territory? A. Yes.

Q. And you had two-thirds of the business? A. I think it is safe to say we had two-thirds.

Q. And they had the other third? A. Yes.

Q. How long had they been in business there? A. Well, I have only been in business 12 years in Worcester, then about four years. 699

Q. You were both in business? A. Yes.

Q. Did they have a service station where people drive in for gasoline? A. No.

Q. Have they any yet? A. No, sir.

Q. Since that time, since this loaning began, what other companies have come in and are competing there now? A. The Gulf Refining Company and The Texas Company. The Texas Company first, and then came the Gulf.

Q. And they are all using the same method of loaning the curb outfits to the operator? A. Yes, but they have not seemed to make any headway.

Q. They are making an effort, however? A. They are.

Q. How long have they been working there? A. I should say The Texas have been there six years and the Gulf perhaps four years.

Q. But they do make competition? A. Yes.

Q. And they are doing business there? A. Yes.

Q. They are getting some business? A. Yes.

Q. Now, the Tidewater has purchased your company? A. Yes.

Q. And they, I presume, are retaining a good share
701 of your business? A. I think they are, yes.

Q. The Tidewater are also loaning and leasing pumps, the same as the other companies? A. Yes, sir.

(Witness excused.)

WILLIAM J. O'SULLIVAN was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct-examination by Mr. Burdeau:

702 Q. State your name and address? A. William J. O'Sullivan, Cambridge, Mass.

Q. What is your business? A. Petroleum jobbers.

Q. That is the American Oil Company of Cambridge, Mass.? A. Yes.

Q. Is that a corporation? A. Yes.

Q. What is your position with that company? A. Treasurer.

Q. Have you anything to do with the marketing of your product? A. Indirectly; not directly.

703

Q. Do you understand the conditions under which your company markets its product? A. As they have been reported to me.

Q. In what territory does your company do business? A. Metropolitan Boston.

Q. Not outside of the State of Massachusetts? A. No.

Q. Do you know what competitors your company has in that vicinity? A. The Standard Oil Company.

Q. Of New York? A. Of New York; the Gulf Refining Company, The Texas Company and the Tidewater; that is practically all.

704

Q. Does the American Oil Company loan or lease pumps for a nominal consideration to its retail customers? A. Yes.

Q. In how many cases has that practice been adopted? A. Oh, I should say 15 or 20.

Q. When did your company begin to do that? A. Between two and three years ago.

Q. Did your company ever lose a customer because of its refusal to lease or loan a pump for a nominal consideration? A. Yes.

Q. About how many customers did your company lose for that reason? A. A considerable number. I do not know just the number.

705

Q. Was that within the last two or three years or before your company made up its mind to go into that practice? A. When I answered your question, I had in mind prior to the time we entered the practice.

Q. Will you state how your company came to go into the matter of loaning or leasing these equipments? A. We were obliged to go into the loaning and leasing of pumps because whenever our customers happened to need a new pump to replace their old one which had worn out, or they wanted a

5-gallon pump to replace their 1-gallon pump, they simply told us if we would not do it, they could get it for a nominal sum from the Standard Oil Company, and we were, therefore, obliged to lease or loan these pumps.

Q. When you speak of customers who wanted to replace their pumps, do you mean by that these customers owned their own pumps at that time? A. Yes.

Q. And they had become unfit for use through wear and tear and so forth? A. Exactly.

707 Q. Can you give the approximate number of such instances? A. I should say it is between 15 and 20, the number of pumps we installed. Those were only our own customers who were likely to be attacked by our competitor.

Q. Do you consider from your experience in the oil business, that this practice of loaning or leasing pumps for a nominal consideration is a sound business method or policy?

Mr. Speer: We object to the question as immaterial, irrelevant and incompetent.

Examiner McCorkle: The objection is noted. Proceed.

708 A. Most certainly not.

By Mr. Burdeau:

Q. Will you please state your reasons for thinking it is not? A. It removes competition in petroleum products and places it on the pumps and tanks; and that, in turn, even in that competition, there is no equality of competition or opportunity, on account of the insidious methods of advertising by the Standard Oil Company.

Q. What do you mean by that? A. Putting a

premium on garages using their pumps and tanks and having their trade-mark.

Q. I would like you to be a little more specific than saying what happens. What do you mean by "putting a premium" on garages that use their trade-mark? A. They advertise the garages that use their gasoline and consequently use their trade-mark. They list them in the papers as reliable dealers, where the best gasoline can be obtained and as the best way to be sure that reliable gasoline can be obtained.

Q. You know nothing about the circumstances under which those advertisements are put in, do you? 710
A. I do not just understand your question.

Q. What I mean is, you speak of certain garages being listed? A. Yes.

Q. Do you know whether any charge is made for such a listing? A. Any charges?

Q. Whether any charge is made by the Standard Oil Company for listing a garage in such an advertisement? A. The fact that they use their gasoline and in some instances as a lever to have their equipment installed.

Q. Have you fully stated your reasons for believing that the practice is a bad business plan? A. Well, there is another phase of it that enters into it and 711
that is they use the equipment, once they have it in, as an intimidation whereby to hold their trade. For instance, a garage man might be persuaded to install the Standard Oil equipment practically free and later on have a change of heart and want to come over to an independent, and the Standard Oil Company, by reason of their lease, could either rip his tank and pump out, at considerable inconvenience to the garage man, or the cost price of the equipment might be due the moment they put another company's gasoline in their tanks, and their accounts

could be trusteed, I suppose, and cause the garage man considerable trouble.

Q. Do any of the companies besides the Standard Oil Company of New York make a practice of leasing or loaning these pumps and tanks in your territory? A. Yes, the Gulf Refining Company and also the Tidewater.

Mr. Burdeau: That is all.

CROSS-EXAMINATION by Mr. Speers:

713 Q. Do the Gulf and Tidewater people advertise their gasoline, too? A. Somewhat, yes. I should split that question, perhaps, and say that the Gulf does, somewhat, and the Tidewater does somewhat extensively, just now.

Q. Yes, and that is rather the business practice in every line, is it not—to advertise your product as being good to buy? A. Yes, but that is not the way that the advertising of the Standard is done.

Q. You say they advertise in the papers and otherwise that certain garages are selling their gasoline? A. Yes.

Q. And you say that is a bad practice? A. No.

714 Q. What is there bad about it, then? A. If you will just let me refer to this ad. in question—they say that the best way to be sure that the gasoline you buy measures up to quality standards is to buy from the dealers listed below. That is not necessarily true.

Q. Because those dealers sell their gasoline, is the idea? That is what the advertisement says, when you get through with it, is it not? A. It not only says that, but it says that the sign of a reliable dealer is the Standard Oil sign.

Q. That is, they hold out that they do not put their gasoline in garages unless he is a reliable man? A. If they do, they hold that out falsely.

Q. Why so? A. Because that is not altogether true. The sign is not necessarily, of itself, a sign of quality. It is not a sign that the man buying Standard Oil gasoline is reliable.

Q. What you are objecting to, now, is the way they are advertising their business? A. Not necessarily. Principally, their system of leasing and loaning pumps.

Q. You have made that the point, as the reason why you are objecting to this—that they not only lease their pumps, but they advertise? A. Yes.

Q. In a way that you think is improper, the garages 716
which handle their product? A. Yes.

Q. It is this advertising that you are complaining of particularly? A. No, it is not.

Q. Well, you are complaining of it as the main feature? A. No, I am not.

Q. They advertise in the papers here in New York, do they not—a whole page of garages? A I don't know.

Q. Where their gasoline can be purchased? A. I don't know anything about it.

Q. Don't you know that other companies do the same thing and advertise garages that handle their gasoline? A. No.

Q. You don't know anything about that? Don't 717
you know that the Tidewater are doing that? A. The last advertisement that I looked at of the Tidewater had no garages listed.

Mr. Speer: I have nothing more.

(Witness excused.)

718 *E. J. Little, Direct*

A. E. JONES was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. State your name and address, please. A. A. E. Jones, 238 Wilson Avenue, Newark, New Jersey.

Q. With what concern are you affiliated? A. The American Oil & Supply Company.

Q. What is your position with that company? A. Vice president and general manager.

Q. How long have you been associated with it?
719 A. Fourteen years.

Q. Is that the total extent of your experience in the oil business? A. It is.

Q. What is the general business of your company? A. Marketing of lubricating oils only, from petroleum products; no gas or refined oils.

Q. You do not market any gasoline at all? A. No, sir. I have not been able to quite figure out why we are here.

Q. Well, I do not know, either. You have no experience, then, in the gasoline industry at all? A. None at all, sir.

Mr. Zechiel: That is all.
720 Mr. Speer: No questions.
(Witness excused.)

E. J. LITTLE was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. State your name and address, please. A. E. J. Little, 50 Church Street, New York City.

Q. With what concern are you employed? A. S. F. Bowser & Company, Fort Wayne, Indiana.

Q. What is your position with that company? A. District manager, New York district.

Q. How long have you been in that capacity? A. About two years in that capacity.

Q. How long have you been associated with that company? A. About 12 years.

Q. What has been your territory during that time? A. I have operated in Chicago and had charge of the Fort Wayne district, which covered about fifteen states, the central states and the south; had super- 722
vision of eastern territory at one time; at present in charge of the work in the Metropolitan district, Fairfield County, Conn., Westchester and Putnam County, Rockland County, New York, and northern New Jersey.

Q. How long have you been engaged, in one capacity or another, in this territory where you now are? A. In one capacity or another about three years, in the eastern territory.

Q. What is your company engaged in? A. Marketing tanks and pumps for handling oils and gasoline.

Q. In marketing those products, what is your general scheme or plan? A. We employ salesmen 723
to represent us in prescribed territory; some of the men working on salary, but mostly men on commission, operating at their own expense.

Q. How do these men conduct their business, in a general way? A. They go into the territory and solicit the sale of our product to the individual user.

Q. And the user, in that case you refer to— A. The public garage man or retail store man—any one who sells or handles or stores, for his own purpose, gasoline or oils.

724 *E. J. Little, Direct*

Q. In the conduct of your business for your company do you have occasion to travel about over this territory, or not? A. Yes; I make occasional trips into the territory with the men.

Q. Are you or are you not acquainted with the retailers generally of gasoline, the stations where your pumps have been established and other stations? A. I would not say that I am acquainted generally, but I know enough to have a good idea of the situation in the territory.

Q. Tell your experience, generally, either in the
725 territory at large or in various portions of the territory, as to whether or not garages and retailers have more than one equipment? A. Generally they have one. In exceptional cases they have more than one.

Q. Where there are more than one, do they retail different kinds of gasoline, furnished by different oil companies? A. No, that would be a very rare case. In fact I don't know of any such case. May I add something on that point, relating to the previous testimony?

Q. Whatever is pertinent to the issue. A. I noticed in some cases the information was given by some of our men that they thought there might be twenty
726 per cent of such cases where there were duplicate pumps, and that in those cases fifty per cent of that twenty handled two kinds of gasoline.

Q. Yes. A. I have motored and traveled in about, I should say, fifteen states, and I have never seen a case where a concern—it never came to my personal notice where a concern handled the gasoline of the two different concerns.

Q. But you do not know that that is not true in some cases? A. No, that is only my observation. I state that to show that I consider it is a rare case, not the rule.

Q. In connection with your business here in this territory, have you and your agents, under your direction, lost business, the business of prospective purchasers of oil tank equipments because of the practice of oil companies in leasing and loaning such equipments for a nominal consideration? A. Yes, sir; that has been a very serious matter with us. It has been quite discouraging to our salesmen, and it has made it very difficult in employing new salesmen, made it quite impossible, in some instances, to properly cover our territory to keep men on the territory to take care of the business. I would like to add further, 728
if I may?

Q. If it is pertinent. A. That it is not only the loss of the opportunity to make sales, but in this territory we have cases where the oil companies have—I may say an oil company, not oil companies—an oil company has cancelled the business which we have already written, and in some cases prevailed upon the customer to return our goods after the equipment has been sold and delivered and on the ground ready to be used.

Q. You speak of cancelled. Do you mean that, so far as you know now, from your own personal knowledge, whether the oil company actually secured a can- 729
cellation of the contract, or whether the cancellation was because of the general practice of the oil company to lease and loan such equipment for a nominal consideration? A. We judge that the oil companies were instrumental in it. I have a case within the last few weeks which resulted that where a man spent two or three months trying to get us to cancel an order after the goods were delivered; and we finally cancelled it, upon the understanding that he was not to use any other pump in the place of it; that he was not going to use that particular pump or a pump at that time.

730 *E. J. Little, Direct*

After we took the pump back with that understanding in writing, the Standard Oil Company Gilbert & Barker pump was placed there, and the man told us that the Standard Oil Company had the pump there the next morning—

Mr. Speer: We object to that testimony as hearsay.

Examiner McCorkle: The objection is overruled.

By Mr. Zechiel:

731 Q. You mean you went back to the customer the following morning after the installation, and made inquiry concerning the reason for his establishing that pump, although he had agreed not to do so? A. We did not go back the following morning. We did not think the man was going to put in a pump, of course, he had told us so many things about it. We did not believe that he would do it. The next time my salesman drove past, he saw the pump, and I asked him to go back and inquire how that came about; and then, day before yesterday, the customer said—

Mr. Speer: I object to that as hearsay. You
732 got this from your salesman?

The Witness: I have his report in writing.

Mr. Speer: I object to it.

Examiner McCorkle: The objection is sustained.

Mr. Zechiel: I do not think it is particularly material to this inquiry anyway.

The Witness: If you will permit me, I will read the report.

Mr. Speer: I object.

Mr. Zechiel No, I think I will not even care to inject it in this hearing, because it has a bearing that is quite outside of our issues.

By Mr. Zechiel:

Q. About what proportion of the installations in your territory are installations of G. & B. pumps? A. To answer that question, I would like to separate the metropolitan business from the rural business in greater New York, inside the city limits.

Q. In whatever way it makes it most intelligible. A. 734
In the city limits the proportion is not large, because of the restrictions in installations of curb pumps. In the rural districts, outside of the city limits, I should say there were eighty per cent of the Gilbert & Barker pumps.

Q. If you know, does any company other than the Standard Oil Company install G. & B. pumps? A. Not that I know of.

Q. Do you know about what per cent of those installations are under lease contracts? A. I do not know, only as—

Q. From your observation? A. From my observation I understand they are almost all under lease con- 735
tract.

Q. Do you know how the G. & B. equipment generally are marketed? Are you acquainted with the fact? A. Yes; they are marketed through the Standard Oil Companies.

Q. Is it or is it not a fact that the Gilbert & Barker people themselves have anybody on the road selling their equipment? A. We do not meet them in competition in sales, no.

Q. By that do I understand you to mean that you do not meet individual salesmen for that company? A. No.

Q. If there were salesmen in the community, it is likely that you would meet them? A. Yes. We do meet other people who are selling pumps, and we do not meet any one selling pumps from the Gilbert & Barker Company. I might qualify that by saying that I have met one gentleman who has an office here, so that my statement is incorrect in that respect, when I said I had not met any.

Q. Do you mean that he is or is not a salesman for the company? A. I do not know just what his position is. They have a representative in New York, but
737 we do not meet them in the trade as selling pumps.

Q. What you have testified to with respect to New York—is that equally true in all the territory over which you have jurisdiction? A. Yes.

Q. So that it would apply to the New Jersey territory as well? A. Yes. May I have the privilege of just stating something of our general position in this matter, or would that be permissible?

Q. Well, not unless it has something to do with the issues here. A. Well, it would have something to do with the issues as to the seriousness of the problem and its effect upon our business.

Q. If it has something to do with showing the effect
738 on your business, you should be entitled to answer, yes. A. I would like to say, first, that it is not the purpose of my company, as I understand our policy—

Mr. Speer: I object to that. We do not care anything about the purpose of his company.

Examiner McCorkle: The objection is noted. The witness may proceed.

The Witness: The introduction of the leasing of tanks, their not being sold to the trade,has, in a large measure, injured our public garage and filling station business. That is, it has been detrimental to the Bowser business.

739

It is true that we have kept up a volume of business, due largely to going into foreign trade and Government work, but it has been very detrimental to this particular class of business where the equipments have been leased.

We have no fight against the oil companies on this policy, really. We know that we will have to stay in business and do the best we can. We do think, however, that this cancellation of orders that I mentioned in one case is a very bad practice.

740 Q. That, I think, is wholly outside of the issue. I cannot see that we are here trying any cancellation of orders. In fact, so far as the Commission is concerned there is no evidence of that kind and I do not like to have the record impugn any bad motive to anybody. A. The practice is gradually going in a direction, we think, that is ruinous to our business.

Q. That is, because of the practice of leasing and loaning? A. Yes.

Q. And the effect it has upon your sales, or possible sales? A. Yes. We were forced, very reluctantly, to sell goods to other oil companies to meet this same situation, which was destructive to our sales organization, and it has been a very great loss to us. If that 741 is continued, in the direction that it is going by the Standard Oil Companies, it will mean that the other oil companies will be forced to manufacture, the same as the Standard Oil companies do their Gilbert & Barker pump, which will eventually eliminate us from the business which we have been operating for thirty-five years.

Q. That would not eliminate you so far as the jobbing is concerned, would it? Your company would still be in line to do jobbing work? A. I think it would practically eliminate us from business, because it would be so expensive for us, and so great a loss, to change

742 *E. J. Little, Direct*

over our plan. We have investments in office buildings and paraphernalia for operating the business as it is, so that it would really drive us out of the business, in my opinion.

Q. Just along that line: When you say it would drive you out of business do you mean to say that you think your company would be unable to manufacture pumps and distribute them in a jobbing way, in large volume in one order to oil companies; that it would make it impossible for your company to operate economically? A. I think so; because all of our plants
743 have been built on different lines, and we have heavy investments in office buildings and other paraphernalia provided for operating our business as we have been operating it, and I do not think we could compete in the jobbing business. I do not think we would have the opportunity, because I am quite sure that the large oil companies will be driven to making their own pumps. Some of them are already making pumps, ready for that. The Standard Oil Company policy will drive them to that to protect themselves.

The independent oil company is at a disadvantage now, because they have not the facilities for manufacturing pumps. They are paying a larger sum for
744 the pump which they give away than the Standard Oil Company is, because they have to go into the market and buy it. If the Standard Oil Company were buying in the open market, the situation would be different. There are oil companies who are already beginning to lay their plans for manufacturing pumps. The thing has been proposed dozens and probably hundreds of time.

CROSS-EXAMINATION by Mr. Speer:

Q. Mr. Little, as a matter of fact, the business of the Bowser Company, generally, over the country, has increased in the last few years, has it not? A. It is a question in my mind whether it has. We have had increases from export business and Government business, but not from the garage business?

Q. Well it has, in a general way, increased? A. I do not think that is a fair statement.

Q. What do you say about it? A. I say that the business in which the leasing of pumps enters has 746
been very much decreased.

Q. But it has increased in other lines? A. In export and Government work.

Q. And in sections where the companies who are putting in most of the outfits handle some other pump, of course your company does not make those sales, but you do make sales to the other companies that are handling your pumps? A. Yes.

Q. You make sales to the Texas Company? A. Yes.

Q. You make sales to them right in the territory where you have your sales agents, do you not? A. Yes. 747

Q. Now if, instead of leasing these pumps, these companies who are attempting to get their product to the ultimate consumer through these pumping outfits—if, instead of leasing them, they made the operator their agent and compensated him for his labor by a salary, or by a commission, and installed the pump, that would amount to the same thing, so far as your business is concerned, would it not? A. No, it would not.

Q. Why not? A. Because, in appointing an agent, the oil company would have to be responsible for the installation.

748 *E. J. Little, Cross*

Q. Certainly. A. It would have to be responsible for any damages that might come from that installation.

Q. That is as affecting the oil company; but I am speaking now, so far as your company is concerned. They would still put in the same pump they are now putting in, and you would not get the sale. A. I am trying to answer your question, only I wanted to answer it intelligently. The fact that you have to take that responsibility means that you would not make that agency with a little fellow that had no responsibility.
749 You would only make it with a wholly responsible person, where you had to take the responsibility.

Q. You think as a result there would not be so many of them installed? A. There would be probably as many installed but not on the lease basis. We would sell a great deal of the trade where you would not put in an agent.

Q. Why would we not put in an agent if there was enough business to justify putting in a pump, and make the operator our agent? A. You would if he was a responsible agent and there was sufficient business to justify it. That would make a great reduction in the outfits you put out.

750 Q. You think we would not put in so many? A. You would not put them in with the little fellow; and with the larger fellow we would have a fair chance to sell him against your agency arrangement. It would be fair competition.

Q. Is it not, then, the fact that you think the large company would not put in so many agents for the reason that they could not get reliable men, and that the business would not pay them? A. I do not quite understand.

(The reporter repeated the question as above recorded.)

A. I contend that it would leave a fair opening for competition to sell pumps.

Q. But if they turned these leasing stations which they have now into agencies, while it might cost them more to operate and be less satisfactory to them, yet it would not change the pump situation at all, would it? A. Yes, it would.

Q. If they actually changed them over to agencies? A. Yes; it would change it.

Q. If the company has a pump which it is leasing to John Jones, and it is compelled to cease and desist that leasing system, and it makes John Jones its agent, 752
that does not make any change so far as the pump is concerned, does it? A. Not if it was already in there, no.

Q. Does it not make it more sure that the same pump will be kept there in the future than under this leasing system, where a man, when he becomes dissatisfied, can throw the pump out? A. I would not say it would make it more sure, no.

Q. Well, it would make it just as sure, would it not? A. I would have to study that question. I don't know, off-hand, but that plan would give us a chance to sell pumps, where the other plan does not. We believe in competition. 753

Q. As these other companies, the Texas and the Tidewater and the other companies you mentioned, keep leasing and installing pumps, they, of course, are in the market to buy, are they not? A. Yes.

Q. And they buy from whoever manufactures pumps with whom they think it best to deal? A. Yes.

Q. So far as you are speaking of the Gilbert & Barker pump as being owned by the Standard Oil Company, that is merely rumor on your part? You are not acquainted with the ownership of the company in any way, are you? A. You say it is rumor? It is from their own employees.

Q. You do not know, as a matter of fact, anything about it, except what you hear? A. I believe in the investigation on the dissolution proceedings that it was officially stated that it was controlled by the Standard Oil Company.

Q. That was the old Standard Oil Company of New Jersey, was it not? A. I am not sure about that.

Q. So far as you know, the Standard Oil Company of New York, so far as you know positively, the Standard Oil Company of New York is in no way
755 interested in the Gilbert & Barker Company? A. The employees say that it is.

Q. What employees? A. I have talked with a number, and they state that it is so controlled.

Q. Do you mean garage men? A. No, employees of the Gilbert & Barker Company.

Q. Who? A. Do you want to know who?

Q. Yes. A. Mr. Worrell and Mr. C. T. Hatmaker.

Q. Who is Mr. Worrell? A. Sales manager.

Q. He has nothing to do with the operating of the company? A. I could not say. I have talked with Mr. King, and he seems to know all about the Gilbert & Barker Company and their policies. I always
756 assumed so from my discussions with him.

Q. Don't you know that he has told you that he buys the Gilbert & Barker pump at a price, and when he sells them, sells them at a profit? Has he not told you that? A. No. I do not remember such a conversation.

Mr. Speer: That is all.

(Witness excused).

Mr. Burdeau: I would like to call Mr. Benie, of the Cycle Tire & Repair Company, Mount Vernon, New York, and I want to call Mr. Ralph Foreman and Mr. Lou Hutchinson,

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Hempstead, Long Island, and have the default of those three witnesses noted.

Mr. Zechiel: I want also to call Mr. R. S. Matthews, Buffalo, New York, and Mr. L. D. Pierce, of Providence, Rhode Island, and have their defaults noted.

Examiner McCorkle: Let the default of the witnesses whose names have been called, and who have failed to appear, be noted.

Mr. Zechiel: I believe that is all. May we have the record show that we adjourn, at this time, to meet at Washington, in the offices of the Federal Trade Commission, at 2 o'clock 758
P. M., on November 24th?

Examiner McCorkle: All right. That is understood.

Whereupon, at 11:20 o'clock A. M., an adjournment was taken until November 24, 1919, at 2:00 o'clock P. M., to meet at the offices of the Federal Trade Commission in Washington, D. C.

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760 **Testimony Before the Federal Trade Commission, Washington, D. C., Nov. 24, 25, 26, 1919.**

UNITED STATES OF AMERICA.

Before the Federal Trade Commission.

FEDERAL TRADE COMMISSION vs. ATLANTIC REFINING COMPANY, *et al.*	Docket Nos. 131, *et al.*

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Washington, D. C., Monday, November 24, 1919.

Met pursuant to adjournment, at 2 o'clock P. M.

Before: Examiner McCorkle.

Appearances:

Mr. Chester L. Zechiel and Mr. Joseph A. Burdeau, in behalf of the Federal Trade Commission.

Mr. Peter M. Speer, for the Standard Oil Company
762 of New York.

Mr. James L. Nesbitt, for the Texas Company.

Mr. Charles L. Guerin, for the Atlantic Refining Company.

Proceedings.

HARRY H. WILLOCK was called as a witness, and having been first duly sworn, testified as follows:

By Mr. Zechiel:

Q. What is your name? A. Harry H. Willock.
Q. And your address? A. 54th Street, Pittsburgh.

Q. With what company are you connected? A. With the Waverly Oil Works Company.

Q. How long have you been associated with that company? A. Thirty-two years.

Q. What is your company's business? A. Refiners of petroleum oils.

Q. Do you do any selling of your products to retailers? A. We do in the Pittsburgh district.

Q. How do you conduct your business generally in other districts? A. We sell through the jobbers.

Q. How long have you been engaged in selling to retailers of gasoline and your products? A. The com- 764
pany has for about thirty-nine years.

Q. And what has been your own experience in that connection? A. About thirty-two years.

Q. What have been your various connections with your company? A. I began as office boy; I am secretary and treasurer of the company now.

Q. During that time have you had occasion to become acquainted with the distribution end of your company's business? A. Yes; that has been my business.

Q. What are the general products which your concern puts on the market? A. A full line of petroleum products; that is, gasoline, naphthas, gas oils, fuel 765
oils.

Q. Do you also deal in lubricants? A. Illuminating oils, lubricants, paraffin wax.

Q. Do you sell lubricants to the retailers as well as your gasoline product? A. Yes, in the Pittsburgh district.

Q. In connection with the sale of your products have you ever dealt in any way in what is known generally as curb pumps, used in the distribution of those products? A. We have acted as a jobber of pumps. We have bought them from the manufacturers and sold them to our customers.

Q. How long have you done that sort of business? A. I don't believe we have done anything with pumps for more than six or eight years.

Q. What has been the general extent of your business along that line, say, in number of pumps sold per year or per month; just to get a general idea? A. That has always been something we never pushed at all. We simply handled them as a convenience to our customers, many of them not being particularly familiar with where to get such things, and we used them in that way, to give to these people.

767 Q. Have you any idea about the number that you have sold in that way? A. Oh, I don't presume it would amount to twenty-five a year.

Q. In the neighborhood of a couple of hundred pumps or three hundred pumps? A. Oh, that would be the very outside.

Q. To whom have you sold these pumps, in a general way? A. People who were dealing in gasoline.

Q. That is the retailer? A. Yes, the little garage man.

Q. And have you also placed such equipments with private concerns, private garages, and that sort? A. In a few instances we have sold some to private in-

768 dividuals.

Q. Now as to these retailers, do they include the grocery stores? A. No. Of course the grocery store don't use gasoline in our district to amount to anything—that is, do not deal in it.

Q. He is not a retailer? A. No, he deals only in kerosene.

Q. By whom in the main is the retail business conducted in your territory? A. You mean in what product?

Q. In the gasoline product? A. Oh, the garage and the service station.

Q. You do not have any general retail business conducted by grocery stores and that sort of thing? A. No, not in gasoline.

Q. You have sold your pumps to large and small garages, have you? A. Generally the smaller garages, because the larger garages were more familiar with the sources of supply and did not ask us for them, and we did not solicit them.

Q. In the sale of your pumps you have sold such equipment, whatever it may have been, at what you considered a fair margin of profit, or at cost? A. No, no; we are not in business for pleasure, and we 770 make a profit.

Q. Have you or have you not, in connection with your sales, ever entered into agreements or understandings of any kind, that your vendees, those parties buying pumps through you, should use your product to the exclusion of others or to the partial exclusion of others? A. No, we never considered it good business.

Q. Are you acquainted with the practice as engaged in by certain competitors of yours, oil companies, of leasing and loaning such equipments to customers? A. Oh, yes, we know it has been done.

Q. Who are the competitors in your territory? A. 771 Well, there are a number—A. D. Miller Sons Company, the Freedum Oil Works Company, the Beaver Refining Company, the Gulf Refining Company, the Atlantic Refining Company, the Pittsburgh Oil Refining Company. I think that about covers it.

Q. They are competitors in the jobbing end of your business, referring to jobbing or to the sale of your product to retailers? A. Yes. We have people who operate tank wagons in Pittsburgh.

Q. Going back a moment more to your pumps: When you sold these pumps to various parties what

was your general practice? Did you order individual pumps for individual customers? A. Yes; we never carried them in stock.

Q. Those pumps which you sold in that way, from where were they sent? A. They were shipped from the pump manufacturer.

Q. Who was that manufacturer? A. We have gotten them from several places. I have forgotten the names. The business was small. My brother usually attended to the detail of the pump business. I know he got some from Grostken & Company.

773 Q. Do you know where that concern is? A. I think they are in Milwaukee. Most of those pumps, you know, that we handled, were not really for city trade. They were people out in the country that the regular large pump manufacturers who had representatives in Pittsburgh were not as closely in touch with as they were with city people.

Q. Do you know whether or not most of the pumps thus ordered were sent in from outside of your state, to your customers? A. I don't believe any of them were bought in Pennsylvania.

Q. So that you ordered pumps for your customers and they were shipped to the customers from outside

774 of the state? A. Yes.

Q. In connection with your business have you ever lost customers because of the practice of leasing and loaning outfits to either customers of yours or prospective customers? Have you ever lost business of customers? A. Oh, yes.

Mr. Guerin: We object to that as immaterial.

Examiner McCorkle: Note the objection. The witness may proceed.

By Mr. Zechiel:

Q. You may describe that more in detail, if you will, Mr. Willock. A. Oh, well, we would be selling a garage and they reached the point where they wanted more facilities for handling their material, and, of course, in a competitive business one's customers are always being solicited by one's competitors, and we would frequently have the inquiry made of us—they needed another pump or they needed a pump, and would we loan it to them or supply it to them, and we would say no, we would sell it to them. "Well, 776
so and so and so and so will give it to us if we buy their gasoline, and if we take their pump you lose our business." Well, we always used the argument that the buyer always paid in some way for all he got, and we did not pursue that policy, we did not think it good policy for the garage man, and we did not think it good policy for the seller of the gasoline. If we could not come to an agreement we would lose our customer.

Q. And you did frequently lose such a customer? A. Oh, yes.

Q. Do you know to whom you lost such customers, to what companies? A. I have not got in my mind at 777
the present time specific cases, because for the last year or two I was away from my office, for a year and a half in war work, and have only been back now for six months, and I have not been as closely in touch as I was previously, and these names don't stick in my mind for such a length of time. We did lose one customer that happened just to come under my observation a few months ago, about two months ago, I guess, to the Atlantic Refining Company, a very nice account.

Q. If in a general way you know whether you lost customers, and to what companies you lost such cus-

tomers, without referring to specific instances, you may state it. A. Well, we have lost to the Atlantic, we have lost to the Gulf, we have lost some of them to the Pittsburgh. Now whether any of the others or not I don't have it specifically in mind.

Q. Does the Texas Company do business in your territory? A. No, sir.

Q. Are you engaged in what is commonly called the service station business? A. No, we don't operate any of those. We distribute everything from tank wagons, either to the dealer or to the consumer.

779 Q. You don't enter into agency contracts with retailers of gasoline, through which contracts they operate as your agents, using equipment furnished by you? A. We don't furnish any equipment under any conditions. Those things are all in the nature of prize packages, and I don't care to do business on a prize package basis.

Q. You are also engaged in the sale of lubricants? A. Yes, sir.

Q. To these same parties? Do you know whether or not you ever lost lubricant customers because prior customers of yours, in a general way, have installed pumps of competitors under these lease agreements,

780 and afterwards dealt in their products, even to the extent of lubricant products? A. No, not to such an extent. There has been a rather recent new idea in Pittsburgh in that line; I have forgotten now just who is doing it—the Transcontinental or the Pittsburgh, I don't remember which, but I think one or the other, they gave a portable pump or tank with a certain number of barrels of oil; but as far as I know they had no contract that their oil was to be used in it after those certain number of barrels that they sold with it were exhausted.

Q. I think perhaps you did not get my question, then; it was not very clear. I am referring rather to this: Without offering to lease or loan lubricating pumps at all, but merely because, say, the Atlantic Refining Company had installed a leased pump for gasoline, would a customer, who had been your customer, and to whom you sold both gasoline and lubricants, because of this lease agreement with respect to the gasoline pump, whether or not you lost the lubricant business to that company? A. Oh, I can't say that we have, although the natural tendency with such buyers is to rather confine their business to one 782
party. It is more convenient for them to handle.

Q. From your experience in the gasoline business, do you believe that the practice of leasing and loaning oil tanks and pumps for a nominal consideration, under agreements or understandings that the user thereof will not use in connection with such equipments the oil products of any other concern than that furnishing the pump, is a sound business practice?

Mr. Speer: The question is objected to as incompetent, immaterial and irrelevant.

Examiner McCorkle: Note the objection. The witness may proceed.

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A. I think it is a demoralizing practice. It has a great tendency to increase the number of dealers far beyond the requirements of the situation, by encouraging people without sufficient capital to start in the business.

By Mr. Zechiel:

Q. You are referring to retailers when you say "by encouraging"? A. Yes, encouraging them to start in the business, these litle dealers in gasoline and oil. It takes very little capital for anyone to engage in that

business at best, a comparative inexpensive building, and, frequently, a pump is the most expensive part of their outfit, and it leads to an ultimate greater expense of distribution on account of the multiplicity of agencies needlessly. It, of course, gives an advantage to the seller of gasolines of large capital, which the smaller distributor of gasolines would not have, to make that investment in a large way, because these pumps and tanks run into money quite rapidly.

Q. Do you believe that the whole tendency of that sort of a practice is to draw into the retail business
785 incompetent and unsubstantial retailers of gasoline? A. Undoubtedly so.

Mr. Speer: Objected to as incompetent, immaterial and irrelevant.

By Mr. Zechiel:

Q. Are you acquainted with a practice that is in vogue in some competitive areas of establishing agencies and furnishing the equipment to such agencies, who are to sell the gasoline products of the principal? A. Not particularly. Such a proposition I believe was operated for a very short time by the Atlantic, a few years ago, but I don't think they ever
786 pushed it to amount to anything.

Q. Have you ever given that consideration in connection with your own business? A. No, not at all. We were not interested in marketing in that manner. Everything we ship out from the plant goes to a buyer and we don't have any agencies.

Q. Do you believe, Mr. Willock, that if the practice of leasing and loaning these equipments were interfered with by the Commission, so that oil companies were restrained from entering into further agreements of that sort, where garage people and other retailers were not given or leased these equipments under these

conditions to which we have referred, and contracts now in force were to become inoperative, that the effect would be to cause the oil companies to enter equally as freely into agency contracts with various retailers? A. Oh, no.

Mr. Speer: We object to the question as immaterial, incompetent and irrelevant.

By Mr. Zechiel:

Q. Your answer was what? A. No, I don't think so.

788 Q. What is the reason for your answer? A. Well, an agency contract involves considerably more detail, the care of it, than the pump contract calls for. There is no detail in connection with handling the pump contract, after it is once installed; but the agency contract involves more or less of a checking up of gallonage. That was, I believe, the reason that the Atlantic Refining Company some years ago abandoned it. As the stories went around in the trade there—that is all I know about it—they had a lot of trouble in checking up gallonage, and there would be shortages that could not be explained, and it was very troublesome.

789 Mr. Guerin: If I may, I would like to object to the witness testifying to rumors going around the trade.

Examiner McCorkle: Yes, the witness cannot testify to rumors.

Mr. Guerin: And I would ask that it be stricken from the record.

Examiner McCorkle: Argument off the record, Mr. Reporter.

(Argument off the record.)

790 *Harry H. Willock, Direct*

Mr. Guerin: I think we are entitled to have knowledge of all his sources of information, whatever they may be.

The Witness: Of course, our sources of information are simply our tank wagon drivers and tank wagon salesmen who circulate among these people all the time and bring into us the information on which we base, of course, to a certain extent, our business policy—about how things are working in the trade.

Mr. Zechiel: If I may say another word
791 along that line, what has been testified to by the witness is peculiarly in the knowledge of the respondents, the Atlantic Refining Company, and if they wish to deny that as a fact, it is so easy to handle it in that way, and not interfere with the Government testimony in that respect. I think the answer ought to stay.

Mr. Guerin: I think it ought to be established as a fact, and there is a legal way of establishing a fact. I object to this method of trying to establish this as a fact.

Examiner McCorkle: That can be threshed out before the Commission. It is down on
792 paper, but I think it is incompetent evidence. The witness has stated it, and the attorney for the Atlantic Refining Company has moved to strike it out. It can be threshed out later.

Mr. Zechiel: It will not be removed from the record.

Examiner McCorkle. It is there, but it is incompetent evidence, in my judgment.

Mr. Zechiel: Just so the testimony stays in the record.

Examiner McCorkle: It is there.

Mr. Zechiel: And so that it will not be necessary to call the witness back to establish it.

793

By Mr. Zechiel:

Q. If you had not finished your answer as to the reasons why you think that agency contracts will not be entered into as freely under the circumstances referred to in my question, continue, Mr. Willock.. A. Well, with my knowledge of the Atlantic Refining Company's and the Gulf Refining Company's business methods, which in the main are good business methods, I don't think that they would enter into an agency contract with some of the people of the standing of those that they have leased or loaned pumps to, many irresponsible people. Very more or less irresponsible people can get a pump, but I don't think the Atlantic Refining Company would want to dignify them by the name of agents.

794

Q. That is referring specifically to your previous testimony to the effect that numerous retailers have been leased and loaned pumps, which brought into the general situation a lot of retailers that were not the best element to bring into that kind of business, you think that that kind of element would not likely get into the business under the agency plan? A. I think so.

Mr. Zechiel: That is all.

795

CROSS-EXAMINATION by Mr. Guerin:

Q. Mr. Willock, you mentioned that about two months ago your company lost a customer to the Atlantic Refining Company? A. Yes, sir.

Q. Can I have the name of the customer? A. The word "United," was the main part of the title, "United Auto Garage" or "United Garage & Supply Company." It was over on East Street, In Allegheny.

796 *Harry H. Willock, Cross*

Q. The United Company, was it? A. The United Garage & Supply Company, something of that kind, on East Street in Allegheny.

Q. Will you describe to us please, how your company lost this customer. A. The way we happened to lose out there, we make a custom with garage people handling our supplies, if the people permit us we repaint their building and paint their sign on it, and put our "Waverly Gas and Oil" sign on it. These people had been using our gasoline for quite a long time. We put a sign of that kind on their building. It cost us
797 about $100 or $150. It is very good publicity to have a sign right where the gas is sold. That sign had been up about a month when there was quite a drive made, within the last two or three months, by the different companies in Pittsburgh to get tanks placed. It seems as if the whole force of the outfit were intent on getting as many tanks placed as they could, I presume probably in view of the Indiana decision, expecting something like that in our territory, and this happened to be one of the places that they drove on, to get the tanks in.

We had the opportunity to put the tanks in and retain the trade, but we turned it down, and the Atlantic
798 put them in and took the trade.

Q. How do you attribute the loss of the customer to the Atlantic? A. Well, because they got them.

Q. Do you know how they got the trade of this particular company? A. By putting the tank in.

Q. To whom was the offer made to put the tank in, and under what circumstances? A. Oh, I don't know. That was the Atlantic's business.

Q. Oh, you just draw the conclusion that the Atlantic Refining Company is responsible for the loss of that customer simply because the company ceased dealing with you and dealt thereafter with the Atlantic Refining Company? A. Oh, no, they told us.

Q. Who told you? A. The United people. I talked to them myself over the telephone. They happened to get me one day when the man who usually attends to that business was not there, and they told me that they had had our gasoline for a number of years and liked our goods very much, but if they could get a $300 to $500 outfit for nothing they were going to get it.

Q. Who was it told you, Mr. Willock, do you recall? A. No, I don't. I think it was a man by the name of Schmidt; but I am not positive on that point.

Q. You say you object to the system of leasing 800
gasoline pump outfits because it creates too many retail dealers who have no capital. Is it your idea that a man should not engage in the business because he has not a large capital? A. No, not at all. I am a great friend of the poor man, but with all of our feeling along that line we know, as common business practice, that a man must have a certain amount of capital to engage in any business, and that it is not well for the small man to place himself wholly under the control of the big man in order to go into that business.

Q. Do you think that objection is one with which your company for example should concern itself? A. Most assuredly. 801

Q. In the protection of the smaller dealers? A. No, not particularly that, but as a general business proposition it is not good business policy to pursue any practice which unnecessarily increases agencies. The greatest waste that America has today, and all our talk of the high cost of living, is the growing costs of distribution, and they certainly should be curtailed in every way possible.

Q. Do you think it increases the cost of distribution? A. Absolutely.

802 *Harry H. Willock, Cross*

Q. How do you think it increases the cost of distribution? A. If a community consumes a certain quantity of gasoline, or any other commodity, and if the points of distribution are increased beyond the number sufficient to conveniently supply that community, the community must pay an excessive cost in distribution, or those people do not live.

Q. Can you say as a matter of fact that the number of retail distributors now in existence has reached the point where it is in excess of the normal requirements in the particular section wherein the Atlantic Refining
803 Company is operating? A. I feel that there are far more distributing agencies than there is any economical need of, particularly in view of the fact that the large companies are continually establishing their own service stations. I feel that it might be good business policy, or a temporary policy, to distribute pumps and tanks very widely in order that no individual have sufficient gallonage to make it pay him much to handle it, which would cause the trade to be more and more centralized and in the hands of the large companies at their service stations.

Mr. Guerin: That is all.

804 By Mr. Speer:

Q. I don't know whether I understand your last proposition correctly. Is it your theory that it would be better for the business of the country if these small filling stations were discontinued and business was centralized into large service or filling stations owned by the companies? A. No. I feel that there is a certain place at which the distribution of any commodity from retail agencies must become more extensive. The agencies must be sufficient in number to be a convenience to the consuming trade. But after that point has been reached expansion beyond that merely means

multiplying agencies to the ultimate cost of the consumer.

Q. It is a fact then that this leasing of pumps has caused a great many of these filling stations, curb filling stations as we call them, to be established, that in all probability would not have been established if that system had not been adopted. A. Oh, I feel very certain of that.

Q. There is no question of that? A. Yes.

Q. As a matter of fact it is the cheapest way by which a marketer, a large marketer, who wishes to sell his product to the ultimate consumer, to the automobile man, it is the cheapest way by which he can reach him, is it not? A. You mean through this multiplicity of small stations? 806

Q. Yes, through the small station like this. It is the cheapest way by which you can get at the public, is it not? A. You mean to give him the tank? I don't think so. He gives him a pump that is worth from $300 to $500, and the amount of gasoline that a number of these little stations put out is very material. In fact they would not put those tanks in at all if they had to pay for them. They only put them in because they can get them for nothing, and because maybe by having gasoline there, a little bit, it might bring a fellow to them and they might talk him into buying a tire. 807

Q. That is the way I understand it. If the operator of these little curb stations, which have become so numerous throughout the country, was compelled to buy the pumping outfit, in all probability he would not establish his station at all, would he? A. No, in many cases that is true.

Q. And the marketer by furnishing him an outfit establishes a filling station there for the public to obtain gasoline, which otherwise would not be estab-

lished, in many cases. A. Yes, but not to the convenience of the public.

Q. Well, that is another question. A. Or not to the profit—

Q. But it establishes the station there anyhow, does it not? A. It certainly does. You can see it with your eyes.

Q. What does it cost to put in one of those little filling stations? A. I am not familiar with the cost, but it would be according to the size of the tank in the ground and the size of the pump; oh, somewhere about
809 $300 to $500.

Q. If a marketer was going to establish a service station where the automobiles would come and be supplied, and had obtained a property for that purpose, what would it cost, as a rule, the ordinary service station of that character which you know about in the country? A. You mean including property costs?

Q. Oh, well, of course, it would depend whether that was in the city or in the country, whether it was a sheet-iron shed, or whether it was like the wonderful buildings that the Atlantic are putting up in Pennsylvania—it would cost from $100 to $1,000.

Q. And for that cost a great many of these little
810 little curb stations could be established? A. There could be undoubtedly a great many of them established.

Q. If a small dealer with a small capital comes into a community and attempts to build up a trade in his product, his gasoline, is it not cheaper for him to establish a few of these curb filling stations, by leasing pumps, and thus get at the public with his product, than to have to purchase and erect an expensive service station? A. Oh, there is a better way than that, far better. I don't know what your service stations

cost per gallon, but I just have a sneaking idea. The reason we never established any, we deliver all our gasoline by tank wagons to the user, and we can do that for a cent and a quarter a gallon, and I am very sure that it takes quite a material, a very material, station to bring the cost of distribution to two cents a gallon.

Q. Now, your refinery is located in that community? A. Yes.

Q. Do you sell all your gasoline product through tank wagons? A. Except what we ship to the country in barrels. 812

Q. Then this is really the only part of the country where you are distributing through tank wagons? A. Oh, yes, sir.

Q. How much of your product do you distribute in that way? A. All the gasoline that we make, and then we buy considerably. I presume we distribute, oh, a million and a quarter gallons.

Q. The rest of your product you ship to dealers in other parts of the country. A. Well, the rest of our product, meaning in gasoline.

Q. But you do distribute all the gasoline you make right in this community? A. Yes.

Q. From tank wagons. A. And the country barrel trade. 813

Q. The country barrel trade? A. Yes.

Q. Do you ship much of it by barrels? A. Oh, yes.

Q. How is that used? Does that go to the automobile people as a rule, that gas in barrels, or what trade does that supply? A. Yes, to the automobile consumer or dealer, the garage man.

Q. That would probably be to a very small garage, private garage, that would buy a barrel? A. Well, yes, one barrel, and then a larger would buy a carload.

814 *Harry H. Willock, Cross*

Q. What does he do with it when he gets his carload? A. Of course some of them market out of the barrels, but the most of them put it in their tank, in a tank, and market it from the tank.

Q. What do they do with the barrels, if they use barrels, when they get through with it? A. Return them.

Q. To you? A. Yes.

Q. Do they buy their barrels from you? A. Yes, they are billed to them.

Q. And they get credit when they are returned? A.
815 Yes.

Q. They always have an account with you large enough to cover the amount of the barrels? A. I did not quite catch that.

Q. You bill them for how long a time, thirty, sixty or ninety days? A. Thirty days. The barrels are billed the same time as the gasoline, and if at the end of thirty days they send us a check for the amount of the gasoline on the bill, and a bill of lading for the barrels, their bill is cancelled.

Q. And whenever the barrel comes back, whether in thirty or sixty days of course you give them credit for it? A. Of course, but they have to pay for it, if
816 they want to keep it any length of time.

Q. If they don't want to keep it it is returned? A. Yes.

Q. You sell them a considerable quantity and they always owe you enough to cover the price of the barrel? A. Oh, no.

Q. There is an open account? A. Yes, but those accounts are very frequently cleaned up, absolutely clean. They may have fifty barrels and they will send the fifty barrels in, and we will send them a check for $400.

Q. It amounts in the end, so far as the money outlay to them is concerned, just the same as if you had loaned them the barrels? A. Oh, I want to make clear to you that we don't carry the investment in the barrel.

Q. It is carried in their account? A. We are not out the money on the barrel until they please to send it back, by any manner of means. Let me explain to you. The Atlantic Refining Company don't want their customers to keep their barrels. They insist that they send them back.

Q. Yes. A. They charge them a big price for 818
them, too, but rather put the pressure on them to send them back. And no matter whether the customer wants to keep them, they won't let them. Now our psychology of the barrel game is entirely different. We have no marks of identification on our barrels whatever, no name embossed in the barrel, no number embossed in the barrel. We simply have a paper label sheet on, and after that barrel has been out in a couple of rains, the label is gone, and nobody knows who owns the barrel whatever. And we rather want to put the pressure on them to let that empty get into the ordinary channels of commerce, just as if it were a pickle barrel or vinegar barrel, or any other kind of 819
barrel. We do not want them to be digging up one of our barrels fifty years hence and because our name is embossed on it, send it back and want a big price for it. We charge our barrels at cost, and as we can buy a new barrel—and of course we prefer to spend the money for a new barrel than for a second-hand one—

Q. Then as I understand, you don't get any profit on the sale of that barrel? A. Oh, no; we are selling gasoline.

Q. You actually bill it at cost? A. We actually bill it at cost, yes, sir.

Q. And then if it comes back to you you give them credit at cost? A. Yes.

Q. If a man bought a barrel of gasoline from you what would the gasoline be worth at the present prices, we will say? A. The gasoline would be worth, oh, say, $15.

Q. What would the barrel be worth? A. $8.

Q. That would make a bill of $23, then? A. Yes, sir.

Q. And you would bill it to him— A. At $23, yes.

821 Q. At the end of thirty days if he had the barrel back he would get credit for that amount? A. Yes.

Q. And then he would only pay the $15? A. Yes.

Q. That would amount in figures just as though you had loaned it to him, as far as that particular transaction was concerned? A. Yes.

Q. Did I understand you to say that this loaning of pumping outfits induced men of small capital to go into the business that otherwise would not go in? A. Yes, sir.

Q. And you think that is a mistake, to stir up competition in that way? A. No; you put it a little wrong.

822 Q. I will leave out the word "competition." You think it is bad business to get men interested with small capital? A. No, not small capital, because no business only requires small capital, but who have insufficient capital for the business into which they go. Now, a man can go into the gasoline business at the outside with a capital of a very few hundred dollars. But what I complain about is that he goes into the gasoline business with a capital of nothing but supreme nerve.

Q. Yes, and you object to so many people going in the business, don't you, who have not sufficient capital? A. Of that character, yes, sir.

Q. You think then it is better if the business of the merchandising or marketing of gasoline should be confined to large companies with large capital; is that what you mean? A. Positively not.

Q. You think there is a sort of golden mean which ought to be followed, and that men of small capital ought to be kept out of the business? Is that your theory? A. No, sir; insufficient capital. There is a great distinction there.

Q. You think there ought to be some method by which those people could be restrained from entering in the business? A. Not in free America. 824

Q. No. A. But not encouraged by unfair business methods.

Q. Your barrels that you furnish have nothing to indicate it is your gasoline that is being sold from them, except a sign that is washed off easily? A. Yes, sir. We have a paper label there that is on the barrel, and that will stay on that barrel in the ordinary transportation to a customer.

Q. But he can easily wash it off? A. Oh, it is put on with resin oil. It is not easily washed off, but it is washed off if the barrel is thrown out of the building empty and stands, as you see empty barrels standing, over the country, in the weather. If it lies out in the 825 yard for two or three weeks, yes, the label will likely disappear. It is a paper label.

Q. And when the label would disappear there would not be anything then to show the customer whose gasoline he was buying, would there? A. The customer is not interested in an empty barrel.

Q. But I am speaking of a barrel that was not empty, and after the label was washed off? A. The label won't be washed off as long as the barrel is full, because they don't allow full barrels to lie out in the weather.

826 *Harry H. Willock, Cross*

Q. But that label could be removed easily, could it not? A. Oh, yes. If anybody set to work to scrape it off. Sure, it can be scraped off.

Q. And when it is scraped off, no matter how it has been, there is nothing on the barrel to indicate whose gasoline is being sold? A. No; that is true of any label in the world.

Q. You like to have something on the barrels out of which the gasoline is being sold, to show it is your gasoline? A. Yes; that is the reason for putting a paper label on it, in the first place.

827 Q. You sell a grade of gasoline that you consider especially good for the automobile trade? A. I don't believe our trade would buy it unless it were especially good, because we ship so much out to the country in steel barrels, those people all being served in tank wagons from the Gulf and Atlantic at a lower price.

Q. You are confident that the fact it is your gasoline is a good factor in making sales? A. Sure thing.

Q. And that a marketer of gasoline like this who has an especially good brand desires in some way to have the public know that it is his gasoline that they

828 are purchasing? A. Sure.

Q. Outside of the immediate locality which you supply with tank wagons you have not undertaken to establish any distributing points where you supply gasoline to the trade by tank wagons or any other method? A. Well, we ship it in steel barrels outside of our tank wagon delivery.

Q. Those are what we have been talking about, that they may send back to you if they wish? A. Yes, sir.

Q. Before this system of having these pumping outfits was introduced—I do not mean the leasing spe-

cifically, but the use of these pumping outfits— A. Yes, sir.

Q. How was the gasoline delivered to the garages or to the consumers at that time? A. The pumping outfit came in practically—well, in fact there were pumping outfits—the Bowser tank I think is an older tank than the large consumption of gasoline. I think there were Bowser tanks before 1902. They had those tanks in stores for kerosene, oil, lubricating products, and such things as that. Of course the original garages started out pretty much like the original automobile, they were pretty bum affairs. They 830
would put a steel barrel on tap, as it were, with a faucet, I mean.

Q. How would they deliver the gasoline to the automobile? A. Draw it out in a bucket and carry it out and put it in.

Q. That was rather a wasteful way of delivering it? A. And a very dangerous way, too.

Q. With liability of an explosion? A. Yes.

Q. And it would evaporate while being run out. A. That was not of very great moment, but the danger of the practice was the greatest objection.

Q. And in those days they sometimes had quite large tanks that they filled with gasoline and drew 831
it out in the same way? A. Drew it out in the same way, yes.

Q. The universal use of gasoline has increased largely, or really developed since the universal use of the automobile, has it not? A. Oh, yes.

Q. And that has required that a supply be furnished at a great many more places throughout the country than otherwise? A. Unquestionably.

Q. So that a man going along can drive up and fill his automobile tank with gasoline? A. Yes, sir.

Q. Has not the use of these pumping outfits—I am not speaking of the leasing of them particularly, but their use, on account of the necessity of the automobile owner—become practically the only method by which gasoline is delivered to autmobiles? A. Yes, sir.

Q. Whether it is sold from garages, service stations or at the curb, they all use this same pumping outfit? A. They should all have to use it.

Q. Yes, they should be compelled by law? A. Yes, sir.

833 Q. So that they could not use the old method? A. Yes, sir.

Q. Have you more than one distributing point, or do you operate all your tank wagons from one distributing point? A. All from the works.

Q. Have you a pumping outfit there to supply automobile people who may chance to come along? A. No, we discourage that.

Q. You don't want to be bothered with it? A. We do not want automobiles to come into the plant. We have to have our own trucks in and out, and we do not want automobiles coming into our plant.

Q. So you do not have any pumps at all? A. No.

834 Q. You do not sell anything to the automobile man at all, do you? A. Oh, yes; we deliver to his house.

Q. To his house? A. Oh, yes, to his own storage.

Q. Do the automobile owners who have private garages, as a rule, have pumping outfits in them? A. A great number of them have. Some of them do not have, but I don't believe there is as many, by any means, in actual number, not comparing the great increase in the use of automobiles—I don't believe there is as many in actual number delivered in make-shift

storages, you may say, today, as there were ten years ago.

Q. Originally he would have a barrel or some cheap tank? A. Usually they would take one of these steel barrels—of course these steel barrels are all I. C. C. specification barrels, and they would put them up out in the yard and put a little cover over them and have a lock faucet on them.

Q. Was it ever the practice, or ever indulged in by any companies, the practice of loaning those steel barrels to private garages? A. I never knew that to occur. 836

Q. A man who could afford to have a garage would probably want to own his own barrel? A. Yes. Our custom was simply to ship out a barrel of gasoline—most of the people we did business with were not in the city, they were country people—we would ship them a barrel of gasoline and charge them with the barrel and charge them with the gasoline, and they would send us a check for the whole bill. Then after they owned it, they would return the barrels.

Q. The next time? A. Yes.

Q. So that as soon as the new barrel came the old one would be sent back to you? A. No. They always mounted the original barrel in rather a substantial 837 sort of way, and they would not want to tear that down. But they would usually pump it from the barrel that they got into the one they had mounted up.

Q. Later on the best private garages put in a little pumping outfit? A. Most of them.

Q. Is it not a fact that this leasing and loaning method, which has caused these pumping outfits to be established so plentifully, which are near to every automobile owner—has not that caused many of them not to bother keeping a pumping outfit in their garage, or go to that expense, relying on the pumping outfit in

838 *Harry H. Willock, Cross*

their locality to supply them with gasoline as they need it? A. Oh, I don't know. Yes and no, you can put that. The installation of a number of stations to make it convenient for the trade to get a supply, naturally would cause the man to prefer, if he did not like exercise, to get his gasoline from a station. But the multitude of these stations is no convenience to anybody. In fact these little stations are very inconvenient.

Q. I have not asked you about that? A. Yes, but I answered yes or no and I wanted to explain why
839 I said that. You know as to lots of these little stations, you drive up to them and you want some gasoline. Well, the little girl comes out and says, "Papa ain't home."

Q. Yes? A. "But if you pump it yourself maybe you can get some." They are not convenient, they are not economical. You go to the proper station and the man serves you quickly and properly.

Q. You think it would be better than if instead of having these curb stations, they had regular filling stations? A. No, I don't say that at all.

Q. What do you mean by a proper station, then? A. I mean that the man with insufficient capital has
840 gone into this business and is working some place, letting his wife and children run it during the day, and it is not really a business at all.

Q. But they do sell some gasoline that way? A. They do sell a very little bit, not in proportion to the expense of the facility at hand.

Q. Don't you know that many of the companies are saying that they are engaging in this business because they are compelled to do it so as to hold their trade? A. I suppose men are compelled to do a number of things to hold their trade when their competitors are doing wrongful things.

Q. That is a fact, is it not? A. Of course as long as one strong firm in any trade persists in doing a wrongful thing it works a hardship on every one else in the trade. I always refuse, however, to bend to these things. If a thing is not right it is not right, and we won't put those things in under any condition.

Q. You deliver by tank wagons? A. Yes, sir.

Q. A tank wagon costs considerable money? A. Sure.

Q. How many tank wagons do you operate just in that section, from this one station? A. We have 842 about two trucks and six or so wagons that we operate regularly.

Q. What does a wagon cost, the ordinary tank wagon? A. We operate all of our tank wagons on a contract. We pay so much a gallon for our delivery, and I am not familiar with those costs.

Q. You don't own the tank wagon, then? A. No.

Q. Oh, I see. Somebody owns the tank wagon and you furnish him the gasoline? A. Yes. Mr. Weir, who is the president of the corporation, has run those. He started that many, many years ago, as a young man, as a side issue, and has operated them ever since. 843

Q. So you don't even own your own tank wagons? A. We actually own the old barrel wagons. I will have to explain at length to be truthful to you. We actually own the old barrel wagons but we do not own the new trucks, and we never owned any of the horses.

Q. Do you charge the men who operate them for the use of these old tank wagons? A. Under our contract with him we were to supply the wagons, furnish the wagons, and pay him a certain amount for delivery of the oil, he having all the expense of sell-

ing and of delivering and of the horses, and all that sort of thing.

Q. But the wagons themselves you own? A. We own them.

Q. And the only charge you make for them is what may be included in the percentage per gallon which he gets for selling your gasoline. A. He gets a certain amount per gallon, yes.

Q. I think we got away from the one proposition that I asked you about, whether the installation of these curb stations, or so many filling stations, has
845 not caused a great many private garage owners, especially the small man with a small garage, who is not able to buy any equipment, caused them to depend upon these filling stations and not put any pumping outfit in his little garage? A. Oh, no. We could cut down delivery stations in Pittsburgh, I should judge, thirty per cent, without disturbing the convenience of the public.

Q. I am not asking you what might be done in that line. Is it not a fact that many of these little private garages, especially out in the country, have no pumping outfit in them at all? A. Oh, many out in the country, yes.

846 Q. How do they supply their autos with gasoline? A. With gasoline?

Q. Yes. A. I suppose out of a barrel.

Q. You say that that ought to be prohibited by law? A. Absolutely. I have no sympathy with it.

Q. But they are not able to put in, a little man with a little Ford car and a little garage is not able to put in one of these pumping outfits, is he? A. If a man is not able to supply the proper facilities for his business he has no right to be in that business, when the convenience and the safety, particularly the

safety of the public, is taken into conisderation, and the insurance laws you will find require that very course.

Q. Yes, certainly. Now, if there are two or three filling stations in his nieghborhood he does not want to put in a pumping outfit, does he, because he can get it at those filling stations, if properly operated? A. You say two or three in his neighborhood. Why not one.

Q. Make it one? A. All right. I will agree with you on that. Then what is the neighborhood of an automobile. 848

Q. I mean within convenient distance, so he would not have to run a mile or two in the morning? A. You see the neighborhood for an automobile is an entirely different thing from the neighborhood for a milk supply.

Q. You concede, as I understand it, that a reasonable number of these filling stations is a convenience in any locality? A. And a reasonable number will be supplied by the trade under ordinary merchandising conditions.

Q. You think there are too many being established now? A. The tendency is all that way, to overdo the business. 849

Q. Is it not a fact there are more companies now marketing gasoline in your district than there were a number of years ago? A. Yes and no. Considering the gasoline marketed there is not as many. But there are a great many more companies than there were years ago.

Q. That is what I wanted to get at? A. Originally you see there was none; then there was the Atlantic, and one by one added on.

Q. So that all these different companies which you have mentioned as now being competitors in your

850 *Harry H. Willock, Cross*

district have come in there as competitors within recent years? A. Yes, speaking of twenty years as recent.

Q. Just one thing that I want to get at. Is it not pretty hard for a man of small means to get into this distributing business by tank wagons? That involves considerable capital, does it not? A. Well, in a community like Pittsburgh it unquestionably involves considerable capital, when you take into consideration the acquiring of property for his storage, his tanks and so forth, but it involves very much more
851 capital if he has to buy $200 to $500 tanks for everybody he sells to.

Mr. Speer: That is all.

By Mr. Nesbitt:

Q. Mr. Willock, the business of your compapny is a growing business, now, is it? A. Yes and no. We have refined 500 barrels of crude oil a day for many, many years. The only way our business grows is by purchasing some other products from other refineries to eke out an insufficient supply of our own.

Q. That is, you market all the gasoline that you
852 manufacture? A. Yes.

Q. And purchase some? A. And purchase some gasoline also, yes, sir.

Q. The management of your business has not in any way been affected by this practice of loaning and leasing pumps, has it? A. Oh, in one way it is to us more of an academic question, I am perfectly willing to admit, than a business question, because we market everything we make. The only way it limits us is this, that we do not need to purchase as much on the outside as otherwise. That in no way alters the facts in connection with that method of doing business.

Q. Will you state again just why your company did not engage in this practice of loaning and leasing pumps at a nominal rental? A. Simply because it was not good business. It is just a prize package business; it is the bait, it is the "come on," it is the bally hoo in front of the show. I rather would put all my cards on the table, face up, with nobody tied to me except by ties of business friendship, of service, of goods. That is the only basis for real business to be done on.

Q. Then is it not really true that you did not engage in this practice because you felt it to be an unprofitable policy for your company? A. An unprofitable policy in the long years; an immediately profitable policy, but not in the long years. You know we have been in the business when it was difficult to be in the business, and we have had considerable experience with business methods. We have been in it long enough to know that to a certain extent the small man in business is very much like the fellow with the small pile of white chips in a poker game—he has got to pursue mighty careful methods or he don't stay in the game. 854

Q. But your policy, even taking the long look was determined on the basis of profit and loss? A. Unquestionably, but at the same time that is simply on the bald basis that if you can hang on long enough, right will win. But you know it has been true in business, and that is what has made most men go wrong in business, that they feared they would not be able to hang on long enough until right won. 855

Q. But you are still hanging on? A. Oh, sure, we are hanging on; we have a good hold on the limb.

Q. Mr. Willock, what limit would you place on the capital with which a man should go into this gasoline business? A. He should have enough capital to pro-

vide the facilities usually and necessarily incident to the type of business he expects to operate. Nobody can put that in dollars and cents.

Q. Have you had frequent experience of stopping at these curb stations and waiting to be served? A. No, sir; I don't own an automobile.

Q. You buy at cost your barrels, don't you, that you deliver to your customers? A. We buy our barrels at cost?

Q. That is what I understood you to say.

857 Mr. Zechiel: Buy them back?

The Witness: Oh, buy them back.

By Mr. Nesbitt:

Q. I understood you to say you bought those barrels at cost? A. Oh, no.

Q. I did not understand.

Mr. Zechiel: Are you looking for a place to get a better price (laughter)?

Mr. Nesbitt: I was going to say, we have been buying our barrels from the American Steel Barrel Company, but—

858 The Witness: Not much. The barrel man attends to that. We have gotten our barrels from the American Steel Barrel Company ever since they began, but only because we found we could get the best barrel for the least money. They have made very handsome dividends on the barrel business, however.

By Mr. Nesbitt:

Q. You believe, do you, Mr. Willock, that there is too much competition in this business of delivering oil direct to the consumer? A. You mean the little tank station? Oh, yes. There are too many of those fellows in the business.

Q. But it is competition that they are engaged in, is it not? A. No, it is not really competition.

Q. What is it? A. Well, they get a price from the company who supplies them with gasoline, with a discount off, and the company that supplies them with gasoline usually has one or more service stations at which they have a price posted, and it would certainly be a swell curb marketer who could get more money on an honest statement of what his goods were than the big handsome service station would sell it to the people for.

Q. Do you have a trademark? A. We have several 860
brands copyrighted. We have a label, a designed paper label copyrighted, with the center of it blank. That is just a Waverly label and then on the center of it, you know, we put in, if it is gasoline or lubricating oil or whatever it is.

Q. You make an effort to identify that mark with your product? A. Not that particular label. We do not advertise that particular label. We simply put in "Waverly Gasoline."

Q. You identify the name with your product? A. Yes.

Mr. Nesbitt: That is all.

861

RE-DIRECT EXAMINATION by Mr. Zechiel:

Q. Mr. Willock, do you in any way advertise through your customers the kind of product you handle? A. Oh, yes. We want everybody to know what stuff—

Q. How do you do that? A. We give them printed matter. Some times we will advertise in the papers, the newspapers, that our goods can be purchased from certain people. We make a business, as I mentioned before, of painting our signs on the garage. I find

that quite a bit more economical than bulletin signs along boulevards, and so forth, because I can paint up a garage very handsomely for from $75 to $150, and that will remain good for at least six months, and then the goods are right for sale where that sign is. While if I put up a 12 by 50 bulletin on the boulevard, in anything like a decent location, not anything extraordinary, just a plain location, it will cost me $150 a month. So I can get very much more publicity for very much less money by painting the garage, because the good garage is always located somewhere where
863 automobiles pass in sight.

Q. Do you attempt in any way to utilize the pump itself as a method of advertising, by glass globes, or something like that? A. We do not have any pumps. If we get the business from—for instance some of our customers or some dealers,have been buying from the Atlantic or the Gulf, and if they have a pump that they own (the Atlantic or the Gulf), of course they have a globe on top of it, with just their name, "Atlantic" or "Gulf," or whatever it is. I think that they supplied them with those globes. I am not positive of it.

Q. Do you know as a matter of fact whether or not the Atlantic and other competitors of yours do
864 have those globes on top of pumps that are not leased and loaned pumps? A. No, I don't know that as a matter of fact. I just see them on a lot of pumps. Of course I never thought of whether they were leased or loaned, or looked at them with that in view.

Speaking of the Atlantic, you know, I don't want to have the impression given that we are deprecating as a general proposition the Atlantic's distributing methods. I have done business with the Atlantic in Pittsburgh for thirty-two years, and their methods have on the whole been good methods.

Q. I don't remember just the answer you gave to Judge Speer's question, whether or not the lease and loan method of conducting this business was not in the long run the cheapest method for any company to distribute its product. A. Well, I think it is an expensive method.

Q. Where is the element of the expense, to your notion that is most prominent? A. There are a great many of these pumps, as I said, put into more or less irresponsible people; they go out of business, and they have to go and dig them up and take them back. The expense, you know, of putting in one of these 866
things, fixing up the pavement, and then going and taking it out and fixing up the pavement again, is as much as the whole outfit is worth.

Q. Then you think the question of expense, the cheapness, and so on, the economic value would depend upon the relative distribution of these pumps as compared with general public requirements and necessities, and that where there is a distribution larger than public requirements and necessities, to many inefficient and irresponsible people, to that extent the business is an expensive and uneconomical business; am I correct? A. Yes, and in another way. No man ever pays very much attention to the care he gives something that 867
belongs to any one else. If you ever have had any experience in renting houses you will have had that driven home to you. Everything that happens to this pump, and they don't care much what happens to it when it is given to them, the company has got to send out fellows to fix it up. Actually those people would not screw up a nut. I know that you practical men in the business here know that only too well; and it is a costly thing all the way through; that from the time that pump goes in until the time the pump comes out it is an inefficient factor of distribution, on a loan or lease basis.

868 Q. Referring again to these barrels which you furnish to your customers, is it or is it not a fact that although you charge these barrels out at cost and pay back money on the basis of cost, do you or do you not get interest on that investment during the time the barrel is actually out with your customer? A. That is a custom as old as the oil trade and as old as any trade in liquids. There was no way to handle those liquids but by the barrel, and that is the way the return package has always been, in every line. It is in the egg case, it is in everything else, any sort of busi-
869 ness. It has not been the custom to make an extra charge for the package, but the way we got into that might interest you, of making an extra charge for wood barrels as for steel barrels. When the tank wagons first came into use in the Pittsburgh district thirty years ago, and they began to be extended throughout the country, the people would buy from the tank wagons, for the reason that the tank wagon would say "Our price is eight cents." Our salesman would go out and say "Our price is ten cents." The buyer would not take into consideration that two or two and a half cents of our price was the expense of the barrel, but ten cents would just sound high to
870 him, and eight cents would sound cheap to him. After we had lost a good deal of trade on that human weakness, we concluded that we would capitalize that weakness ourselves, and so we would make a price of seven cents against the tank wagon price of eight cents. The tank wagon price of course was put in the man's tank. With seven cents the man would have to pay the freight on it, but seven sounded cheaper than eight. So naturally we got a lot of that trade back again, and that is the only reason we have kept it to this day.

Those are human, mental things that you have got to take into account and consider in all business.

871 Q. But it is a fact that with respect to your money which is actually invested in barrels that are actually out on distribution, that you are receiving interest on— A. No, we are not receiving anything on them. We sell them at a certain price. Of course our gasoline always costs the man out in the country more money than he can buy it from our competitors in the tank wagon. That is a foregone conclusion. He has to pay freight on it and haul it in his place, and handle it. And he would not buy that gasoline unless he thought at least he was getting more results.

872 Q. In point of fact is this gasoline barrel paid for on delivery? A. No, in thirty days.

Q. In thirty days? A. Yes. If the man discounts his bill he will discount his oil or his gasoline and send us a check for the barrel net; there is no discount on that.

Q. But whenever the money is paid, whether it is paid cash or in thirty days, it is paid on the barrel and contents? A. And the gasoline.

Q. That is what I was getting at. A. We will sue a man as quick for an overdue amount on the barrel as for an overdue amount on the gasoline.

873 Q. Do you or do you not think that the change from the use of the old-fashioned barrel to the present curb pump, or other pump method of distribution of gasoline, is attributable to the lease and loan practice? A. Oh, no. That grew up long after the pump was introduced. The pump was largely due to the driving selling ability of the pump manufacturers. They are some salesmen.

Q. In that same connection the change, to whatever extent there is a change, from the use by private individuals of their own storage barrels in garages, to the securing of their automobile or gasoline requirements from a nearby curb pump, is that due, in

your judgment, to the practice of leasing and loaning such curb pumps? A. Oh, not at all; not at all.

Q. The mere fact of the distribution from those pumps? A. That is all.

Q. Referring once again to your testimony on this question of over-supply of distributing centers on the part of oil companies, what do you think is the rule that ought to determine the number of gasoline distributing centers to be used by the public? I don't know whether I make that question clear. A. You make it clear, I understand, but there is a large
875 question involved there. I would answer that in this way: The free competition of unsubsidized agencies will provide the public with all proper and convenient facilities.

Q. When you refer to agencies, you do not refer to an agent and principal arrangement or contract; you mean distributing agencies? A. No, I mean pumps.

Mr. Zechiel: That is all.

RE-CROSS EXAMINATION by Mr. Speer:

876 Q. Do you sell any gasoline on 60 days? A. Well, we won't sue a man if he lets his account go to 60 days. We will give him a pretty stiff notice, and he would generally "cough up."

Q. Do you bill any for 60 days? A. Oh, no.

Q. All 30? A. Yes.

Q. But you will waste a little while on him. I suppose if he returned a barrel after the 30 days are up, within a reasonable time, you will accept it and give him credit? A. Oh, we always accept the barrel, but we drive him on the barrel just as we drive a man on his bill. You know you have 30 days with your customers.

give them a notice that your attorney is going to get

Q. Yes, certainly. A. And you drive them to that payment. And if they do not pay in 30 days, you drive them harder, and if it comes to 60 days, you it in 10 days. Now, you know you may not mean that, because if the attorneys got all the accounts that business men threatened to give to you, you would not be here in Washington.

Q. You don't want to anger a customer that you know is good, or sue him, because he don't return the barrel in 60 days? A. Or pay his gasoline bill, either. 878

Q. If he pays his gasoline bill in advance, you give him a discount? A. Oh, we give one per cent discount.

Q. But you don't give him a discount on the barrel? A. Oh, no.

Q. If he returns the barrel even if the 30 days is expired, you don't charge him any interest on the price of it? A. No, no more than we do on the gasoline if we left it run over.

Q. You don't charge interest on that, either, unless you have to sue? A. That is the idea. When we sue, we add in everything that we can add. 879

By Mr. Nesbitt:

Q. Have you ever brought suit for the recovery of these barrels by what the attorneys call an action in replevin? Did you ever seek to get back a barrel itself where the account was old? A. Replevin means going after something that is yours, don't it?

Q. Yes. A. No.

Q. You never did that? A. No.

Q. You never tried to get back the barrel? A. Not to my knowledge. But of course if some fellow broke up and he had a bunch of barrels we might have

tried to work some hokus-pokus to get those barrels back.

(Laughter.)

By Mr. Zechiel:

Q. Trying to get the barrel? A. Yes. We would pull off a bluff, if we could.

By Mr. Nesbitt:

Q. Which would you say was the modern and convenient method of distributing gasoline, directly
881 to the consumer, by drum or by tank and pump? A. The tank and pump; there is no question about it. If the consumer can get the kind of gasoline he wants out of the tank through the pump.

Q. That is all. A. If he cannot, he will buy it in another way and will be inconvenienced.

(Witness excused.)

CLARENCE SCHOCK was called as a witness, and being first duly sworn, testified as follows:

882 *Direct-examination by Mr. Zechiel:*

Q. Your name is what? A. Clarence Schock.

Q. Your address? A. Mount Joy, Pennsylvania.

Q. With what concern are you associated? A. I am a jobber in petroleum products, in my own name, or rather, I am the proprietor, trading under the name of the Independent Oil Company.

Q. What is your general line of business? A. Gasoline and kerosene in bulk and to some extent, lubricating oils.

Q. What is the general territorial extent of your business? A. Lancaster County, Dauphin County, and Cumberland County.

Q. How long have you been engaged in the oil industry? A. Since 1895.

Q. You are talking about your own personal business? A. Yes, sir.

Q. Did you have any experience prior to that time in this business? A. My father was in the oil business, to some extent, in the days of barrels.

Q. And you were associated with him? A. I was associated with him from 1886. 884

Q. To 1895? A. To 1895 and from that time on, individually. The Independent Oil Company is not incorporated, you understand.

Q. In connection with your oil business, gasoline business, do you also have pumps and tanks which are used in the distribution of those products? A. Yes, sir.

Q. How long have you been engaged in the pump end of the game? A. Since 1914, I think.

Q. Prior to that time you had not either sold or loaned or in any other way handled pumps? A. No, sir; very rarely if at all. 885

Q. In that respect are you now engaged in the leasing or loaning of those equipments? A. To some extent.

Q. How long have you been engaged in that practice? A. Our earliest attempts in that line were simply making dealers substantially our agents for distributing our products.

Q. I want to confine my question just as to the loaning. A. I think since 1915.

Q. Prior to that time how had you handled your pump equipments or business? A. Prior to the time

we loaned the pump the dealer who had it was practically our agent for the distribution of our goods, and we had a limited number of them.

Q. Did you, prior to that time, ever sell such equipments to customers? A. We have sold. I cannot answer how far back we first sold equipment, but we did it simply as a matter of convenience to our customers who were not familiar with the sources of supply of such things. We did not engage in it as a business at all.

887 Q. When you installed or furnished to one of your customers such an equipment, where do you secure those equipments? A. We have bought chiefly from the Bowser people; S. F. Bowser & Company, Fort Wayne, Indiana.

Q. Were those various equipments sent directly from the Bowser factory to your customer? A. Generally to our establishment at Mount Joy and we shipped from there.

Q. And you reshipped? A. Generally. That was not invariably the case.

Q. Sometimes you shipped them direct to the customer? A. Very rarely; they may have been a few instances of that kind.

888 Q. Those that you had shipped to your place at Mount Joy you would merely rebill to the customer, wherever he was? A. Yes, sir.

Q. That was all done in this same wrapping or crating in which it came into your place? A. Oh, yes.

Q. How did you come to begin the practice of leasing and loaning these equipments? A. The competition drove us to it.

Q. Will you explain more in detail what you mean by being driven to it? A. Well, our competitors, in

our field have been pursuing that policy to some extent, and we find it necessary to do it to a limited extent to retain our trade.

Q. That is, you mean to say, then, that you began the practice in order to meet a similar practice of your competitors? A. Yes, sir.

Q. Who are your competitors? A. We have in Lancaster County, the Atlantic Refining Company, the Crew-Levick, the Gulf Refining Company and myself. In Harrisburg, the Atlantic, the Great Western. There is one small jobber there, the Susquehanna, I think, and ourselves—Oh, the Indiana.

Q. The Texas Company does not engage in business in that territory? A. No, sir.

Q. What was the occasion of your beginning the practice of these so-called agency contracts? A. We found it hard to get trade against the competition of the established trade. It was a matter of getting a place where our goods could be distributed economically. For example, at that time it was the custom of our chief competitor in Harrisburg, the Atlantic, to reach out to the consuming trade. We had a hard job getting a few garages to come our way, and the expense of reaching out to the consuming trade with the tank wagon we considered pretty hard. We had some agency contracts by which the agent at that time, when the price of gasoline was from 11, 12 and 13 cents, sold on a commission of one cent per gallon, and we figured that was a cheaper distribution than hauling it around in tank wagons to the consumer.

Q. But you did not retain that as a system of distributing your goods? Why was that? A. Our customers all wanted the pumps from us. The prospective customers who were seeking pumps seemed

to prefer the form of contract of the Atlantic Refining Company, which provided for a purchase clause under certain conditions. Accordingly we had to change to their style of contract to meet the demand.

Q. Did you ever lose any customers, or prospective customers, because of this leasing and loaning of pumps, as practiced by any of your competitors? A. Oh, yes; we have had the business offered to us if we supplied the pumps, where we had our doubts about whether there was enough business to justify the investment required, and such business
893 we, of course, lost. In other cases we accepted the proposition where we thought there was a possibility of sufficient business.

Q. In some of those cases you mean that the business was turned over to the Atlantic Refining Company or some other competitor? A. Our chief competitors on the pump proposition, I guess our only competitors on it, are the Gulf and Atlantic in our territory.

Q. So that all the business lost to which you referred, was lost to the Gulf and to the Atlantic Refining Companies? A. Yes.

Q. Do you know whether or not, as a matter of
894 fact, your competitors did install pumps in those places to which you have testified? A. Yes. Such instances have happened frequently, but at this moment I cannot give you specific cases, because that particular part of the business I do not keep in detail in my mind.

Q. But you know it happened? A. Oh, I know it has happened.

Q. Have you ever lost any lubricant business because of this practice of leasing and loaning oil tanks and pumps? A. Yes, sir; we have.

Q. Explain that, if you please. A. Our competitors in the lubricating business have been pretty free in offering lubricating outfits. So far we have not yielded to that except in one instance where it was demanded, and on account of other considerations—the customer was a good gasoline customer and furnished his own outfit for gasoline—we did give him a lubricating outfit, loaned it to him.

Q. From your experience in the conduct of your business in the sale of gasoline and other petroleum products, do you consider this practice of leasing and loaning oil tanks and pumps for a nominal consideration, under agreements or understandings that the lessee of the equipment shall not use, in connection with the pump, the refined oil products or gasoline products of any other oil company than that furnishing the equipment, as a sound business practice? 896

Mr. Speer: The question is objected to as incompetent, immaterial and irrelevant.

Examiner McCorkle: Note the objection. The Witness may proceed.

The Witness: It seems to be a necessary evil. It is a very expensive way of conducting the business, but I have been unable to figure out any satisfactory remedy. I would be glad if it could be discontinued, because it adds very much to the expense, and the money expended on pumps must be considered practically as an expense item. I would, however, say that for the little fellow, as I am, there ought to be some way that he can provide something to compete with the service station of the big companies. Now, if we must loan to accomplish that then I would be reluctant to see the loaning stopped. If we can do it by agencies it is much more satisfactory to me. 897

898 *Clarence Schock, Direct*

Q. Would it be satisfactory to you if the garage people and other retailers would buy their own equipment? A, Oh, yes, sure.

Q. Do you believe that if the leasing and loaning of these equipments could be prevented by the Federal Trade Commission, or any agency, if the system could be prevented, or were to cease, that the system of agency agreements would result in as wide a distribution of these tanks and pumps, with respect to the agency agreement alone, as the present system of leasing and loaning? A. It would probably reduce the
899 number of them undoubtedly. It would probably limit the number of cases where they are put in without a sufficient prospective business to justify the expense of their installation.

Q. Do you think there would be a material deduction in the number of installations under agency contracts as compared with such installation under the lease and loan contracts? I am not referring now to outright sales; I am confining the comparison to agency agreements versus lease and loan agreements. A. Are you referring to my business or to everybody's business?

Q. I am referring to the business, as you under-
900 stand it, yes. A. It is a very hard question to answer.

Q. Suppose I confine it to your business? A. I don't think it would make a great deal of difference because we uniformly decline to furnish a pump on any terms of loan or agency basis unless we see pretty clearly that it is going to pay, to develop enough business to justify it. We frequently pull them when they do not pay.

Q. From your experience do you think that your competitors have exercised the same discretion in the conduct of their business? I am referring to such competitors as the Atlantic Refining Company and

the Gulf Refining Company. A. In our territory they are very lavish in the distribution of them, and my judgment is that it does not pay to distribute them as widely as they have.

Mr. Nesbitt: I would like to raise the point that as to a question of that sort it will be possible for us to get testimony definitely on such a point, and that that would be the proper method, rather than to develop it through the opinion of a competitor. Would not that be very much more profitable and the only sound 902
way of establishing the point which the attorney for the Commission has in mind? Whether these companies have been making investments that have not yielded any return, is a matter which I believe can only be shown from their own books or those who are familiar with them.

Examiner McCorkle: Yes, I—

Mr. Zechiel: Mr. Examiner, before you rule, let me get my word in.

Mr. Nesbitt: It would be very easy to prove it as a fact.

Mr. Zechiel: I believe it would be almost 903
next to impossible to prove that as a fact in any other way except by the observation of business men who see these things done. I do not think the Atlantic or any other company keeps sufficient accounting to show the cost of every installation of this kind. And I will say this, that if the defendants, the Atlantic Refining Company, or any other respondent, can show the actual cost of each of these installations, and can prove that what this witness testifies to from his experience is not true, it seems to me that is sufficient opportunity for

904 *Clarence Schock, Cross*

the Atlantic Refining Company or any other. And in case the Atlantic Refining Company, for instance, cannot prove it, and this sort of evidence is ruled out, the situation is left without any evidence at all. I think the Commission is entitled to the benefit of this gentlemen's experience in this line of work.

Examiner McCorkle: Your objection is noted, Mr. Nesbitt, and this matter will be brought up before the Commission. I do not like to rule it out, or leave it off the record.

905 Mr. Nesbitt: I know nothing about the books of the Atlantic Refining Company, of course, but it would be a most anomalous situation if the company was making these installations and could not show the cost of each individual one.

Mr. Zechiel: Now, Mr. Nesbitt, don't you—

Examiner McCorkle: Argument off the record, Mr. Reporter.

(Argument off the record.)

Examiner McCorkle: Proceed, gentlemen.

Mr. Zechiel: That is all.

906 *CROSS-EXAMINATION by Mr. Speer:*

Q. Prior to the coming in of these pumping outfits how was the gasoline distributed to the consumers? A. Prior to the regular underground tank and pump?

Q. Yes. A. Oh, generally in barrels or galvanized cans with faucets to them.

Q. What was the practice then as to the container, the barrel or steel drum, as to whether or not it was returned to the seller? A. Generally returned to the seller, yes.

907

Q. And it was a practice usually was it not, it was considered that it belonged to the seller and was merely loaned? A. Yes, I think it is fair to say that is true.

Q. And if instead of doing that it was billed to him and then returned about the same time the bill was due, that amounted to the same thing as a loan? A. It is not so intended, but in practice it happens so. I have done very little steel drum business.

Q. Before you began loaning pumps I understood you to say you had your own filling stations as agencies? A. Yes.

908

Q. And you, of course, owned the pump and outfit there? A. Yes, sir.

Q. Have you a trade brand or mark that you use? A. No. Since 1914, which is really the beginning of our active gasoline business we have been selling chiefly Texaco products, and today their trade brand appears on our pumps.

Q. You put your brand on your pumps? A. Yes, although we are independent jobbers buying from them.

Q. But you sell a brand that you are satisfied is suitable for the trade and you like to have it designated by your brand? A. Yes, sir, as much as possible.

909

Q. In purchasing you seek to purchase a grade or brand of gasoline that will be satisfactory? A. Yes, sir.

Q. That is a valuable trade asset, is it not, to have a name under which you market your product? A. Yes, sir.

Q. And the reputation of which becomes established? A. Yes, sir.

Q. That is a valuable asset, is it not? A. In my case there is some value to the Texaco brand and there is some value to the goodwill I have in doing business, irrespective of the Texaco brand.

910 *Clarence Schock, Cross*

Q. That is your own personal touch with the trade? A. Yes.

Q. That is true of every company that sells its goods under some brand and which furnishes a good grade to the public—that that brand is a valuable business asset to the company, is it not? A. It is undoubtedly, certainly.

Q. And in developing a business in any community do you not seek to obtain places or stations where your goods are sold to the public as yours? A. Yes, sir.

911 Q. That is practically the only way a man can build up a trade, is it not? A. Well, it is one way. There are other ways, of course.

Q. Well, it is a very good way, is it not? A. It is a good way, yes, sir.

Q. You are pursuing that method of having agencies where you owned your own pump, who sold your product in that way to the public? A. Yes, sir.

Q. This method of loaning the pump accomplishes the same thing so far as getting your product to the public under your name, does it not? A. Oh, yes.

Q. And as a matter of fact it is cheaper and more satisfactory than the agency system, is it not? A.

912 That depends on how deeply you go into it. It all depends upon to what extent it is carried on. If you use a pump where there is not sufficient gasoline sold to justify the investment it does not pay, but it increases your selling cost to that extent.

Q. That would be true if it was an agency that you established at a place where there was not sufficient business? A. Yes.

Q. So that so far as that is concerned, that applies to both methods, does it not? A. Yes, that is true.

Q. Supposing you only put in pumps either under the lease system or loaning system at places where

business is sufficient to warrant it, the loaning system is less expensive, is it not? A. No more so, anyway.

Q. Is it not less, for this reason, at least it is more satisfactory: You do not have the responsibility of the accounts with so many different purchasers; that is true, is it not? A. To me it would not make a great deal of difference. To a large corporation it might. We are closer in touch personally with the people we deal with.

Q. You would not sell to those who were not absolutely responsible? A. Yes.

914 Q. As a matter of fact, to the ordinary dealer the agency system has its disadvantages, has it not? A. Well, in my experience I have not had any objectionable experience with it.

Q. Why did you change, then, to the loaning system? A. Simply because the customer demanded a value put upon the pump at which he could buy it whenever he was ready to take it over and it was a case of yielding to the man and giving them what they wanted.

Q. Could not you have continued him your agent and still given him that privilege if he wanted to buy the pump and cease being your agent? A. We probably could have. 915

Q. And that is the way you understand all of them operate under this loaning system; they give the loanee the pump with the option to buy it at cost? A. Yes.

Mr. Zechiel: I just want to point out that the contracts will speak for themselves, and it is not fair to ask a witness to characterize or describe the meaning of these various things.

916 *Clarence Schock, Cross*

The Witness: I will say, in explanation of my answer, that the only contract I am positively familiar with is the contract of the Atlantic as they used it a few years ago. But what their contract today is I don't know. But then they did have a purchase clause or option on the part of the customer.

By Mr. Speer:

Q. And that is why you adopted the same method? A. We had to do it because the people demanded it.

Q. And as far as you know, that is the method
917 pursued by others? A. I understand it to be, yes.

Q. As far as the Texas Company, which does not operate in your territory, is concerned, suppose it wished to come in and market its gasoline there, is not this method of loaning equipment to operators at points where they believed there was sufficient business to justify it, the best method by which they could establish and work up a trade? A. Well, it is one method.

Q. What other method might they use? A. The agency proposition, as I suggested.

Q. That would be according to what you have testified, as I understand, practically the same thing,
918 so far as expense was concerned? A. So far as expense is concerned, yes.

Q. They would have to buy the pump, install it, and make the man their agent? A. Yes.

Q. That is what they do when they loan a pump? A. What do you mean?

Q. When they loan a pump they have to buy the pump and install it for the man, just the same? A. Oh, yes; as far as expense is concerned there is little difference.

Q. If they gave an option to purchase they probably could get a man to take the pump easier than if

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they tried to make him an agent, the same as you found? A. I found it so in some instances; yes, sir.

Q. Don't you think if they were coming in there and trying to establish a business, that they could do it easier and at no greater expense, by adopting the loaning system, than if they tried to create agencies? A. The trouble about the loaning system is that it leads to indiscriminate loaning, I mean the loaning system with the provision of purchase. The presumption is that when the contract is made on the face of the contract there is an intent ultimately for the dealer to take over the pump, but he never does, or very seldom does.

920

Q. I am not talking about that, but that is really— A. That is the difficulty.

Q. That is really the best method, instead of trying to create agencies? A. No, I would not say it was the best method..

Q. You think by creating agencies they would have more of a hold on it? A. I don't think they would do it so indiscriminately. I don't think they would put up so many pumps.

Q. You think they probably would not establish quite so many stations under the agency system? A. Not quite so many stations under the agency system. I think they would establish agents at localities so as to be sure to fill the needs, the convenience of the public, where on this other system they are put out very thick and in large quantities, and unnecessarily so.

921

Q. But they are put out for the purpose of selling gasoline, I presume, through them? A. Certainly.

Q. They make no profit out of them if they don't sell something? A. It is a question in my mind whether they are put out only for the sale of gasoline, because with the big companies the advertising feature of the pump means a good deal to them.

922 *Clarence Schock, Cross*

Q. It is a very valuable thing for them, is it not? A. They probably count it as an advertising proposition.

Q. Even if they don't make very much through that particular pump still it advertises their product and helps their business generally? A. I think that is possible.

Q. Don't you think if the Texas Company wanted to come in there that it would establish a business more economically by adopting either this loaning system or agency system than it could by establish-
923 ing and building a service station? A. My judgment is that the small stations in the hands of the dealers are more economical than the large service station, and my information is that that is the experience of the large companies.

Mr. Speer: That is all I have, I think.

By Mr. Guerin:

Q. Could you furnish me with the specific instances wherein your company lost business to the Atlantic Refining Company? A. I think I explained when I made that answer that I did not have any cases in mind. If the Commission desires it I can send an af-
924 fidavit down here giving you a number of them. But I did not know what I was coming here for today; I did not know what kind of questions would be asked me. So you have taken me totally unprepared on that.

Mr. Guerin: I will say, if I may so state, that such evidence should be stricken from the record and not held binding on the Atlantic Refining Company with specific evidence.

Examiner McCorkle: He has stated he knew of cases.

925

The Witness: Oh, undoubtedly.

Mr. Guerin: May I have an objection noted on behalf of the Atlantic Refining Company?

Examiner McCorkle: Yes. Note the objection of counsel to that question.

Mr. Zechiel: Let us have it specifically pointed out.

Mr. Guerin: My objection is against any general statements which do not give the company opportunity to rebut individual instances.

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The Witness: I recall just now—if you want specific instances, I will give you two. One is in connection with the Gulf and one with the Atlantic.

Mr. Zechiel: Go ahead.

The Witness: Harvey Williams, West Orange Street, Lincoln, had one of our pumps which was thrown out because the Gulf offered one to him. There is a case where I had trade, and they did it. Another instance was H. M. Stahler, along the River Road, at Rockville, near Harrisburg. We had a pump in, and through the persuasion of the Atlantic ours was thrown out and theirs went in. There you have the case both ways.

927

By Mr. Guerin:

Q. You say through the persuasion of the Atlantic. That is rather a conclusion. I think the Commission is after facts. They want the facts about a particular case. A. We were not there when the persuasion occurred, but we have it from the customers all right, the customers themselves.

Mr. Guerin: I ask that an objection be noted, for the reason that the customers are not brought in so that we may have the best evidence, and have an opportunity to examine the customers.

928 *Clarence Schock, Re-direct*

By Mr. Zechiel:

Q. In that respect I want to ask whether or not these statements were given to you at the time you were inquiring, concerning the fact that this pump was removed? A. Whether these statements were made to me at the time the pump was removed?

Q. Yes. A. Yes, certainly. I will say either to me or my representatives. It would take a little refreshing of my memory, and some other memories, probably, to give you the details in the shape you require it.

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Examiner McCorkle: Well, just state what you know. Are there any other questions?

By Mr. Speer:

Q. Mr. Shock, if this practice of loaning pumps was discontinued by order of the Commission or otherwise, by the companies in your community, would you not then in all probability go back to the agency system in the distribution of your gasoline? A. I would prefer to furnish no pumps at all, but the chances are that I would be compelled to do that to a certain extent; I would say to a limited extent.

930

RE-DIRECT EXAMINATION by Mr. Zechiel.

Q. Do you sell, now, your product to retailers who own their own equipment? A. Oh, yes.

Q. How many of such instances have you comparatively speaking? A. We have more who own their own than the others. That is something a little hard to answer.

Q. But your gallonage now is larger to retailers owning their own equipment than to retailers to whom you have loaned equipment? A. That may be true in some instances, and the reverse true in other cases.

Q. I am asking you now. I thought I was quoting your answer. I ask you as to what relations there is between your gallonage to retailers who own equipment and as to retailers who have leased equipment from you? A. I cannot answer that question, Mr. Zechiel.

Q. Could you give an approximation? I thought you said— A. I would say that half of our product —it is a guess for me to make the answer. We have some large customers who own their own equipment. It may be that we sell half of our output through pumps of our own, but not any more than that. I 932
am unable to answer that question accurately now. I could do it by reference to our accounts.

Q. In your best judgment if leasing and loaning were prevented, discontinued as a practice, do you think there would be a greater percentage of installations with retailer-owned equipment? A. Oh, yes, undoubtedly.

Q. How many of the parties, in your best judgment, now who are at the present time leasing and loaning equipment, would buy their own under such circumstances?

Mr. Speer: That is a mere guess.

Mr. Zechiel: I am pressing the question. 933

Mr. Speer: That is guessing the future, and not like estimating on the past.

Mr. Zechiel: I am pressing the question.

The Witness: That is a mighty hard question to answer.

By Mr. Zechiel:

Q. You would not want to venture an answer? A. No. Many of them I think who at the time would not buy would ultimately do so. It would probably

934 *Lawrence MacRae, Direct*

delay the installation—but just how many, it is hard to say.

Q. Do you think that the failure on the part of retailers who now have leased and loaned equipment, to buy such equipment, and the loss to the public of those centers as distributing centers, would inconvenience the public? A. Oh, no; I don't think so.

Mr. Zechiel: That is all.

RE-CROSS EXAMINATION by Mr. Nesbitt:

935 Q. You have some large customers, have you, who have installations that are loaned and leased at a nominal rental? A. Yes.

Q. Would your marketing problem be complicated or simplified if an order were issued enjoining this practice of loaning or leasing at a nominal rental? A. It would disturb it temporarily, undoubtedly, but what the ultimate outcome would be I am unable to say. It is a question, to my mind, as to what should be done.

Witness excused.

936 ---

LAWRENCE MacRAE, was called as a witness, and being first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. Your name is what? A. Lawrence MacRae.

Q. And your address? A. Charlotte, North Carolina.

Q. With what company are you connected there? A. The Brady System Corporation.

Q. What is your connection with that company?

A. I am one of the officers of the company, vice president and secretary.

Q. How long have you been with that company? A. We were organized the first of August.

Q. This last August? A. Yes, 1919.

Q. What was your business prior to that time? A. I was with the Government during the war; secretary to the Finance Committee of the Senate.

Q. What is the general business of your company? A. The jobbing of pumps and tanks.

Q. What equipment do you job? A. The Brady Systems manufactured by the Visible Measure Gaso- 938
line Dispenser Company of Louisville, Kentucky.

Q. What is the general territorial area of your concern? A. We have thirteen states and the District of Columbia—the northern states of New Jersey, around the Atlantic coast; Florida around the Gulf coast to Mississippi. The inland states are Virginia, Ohio and West Virginia.

Q. What is your general method of conducting your business? A. We appoint state agents, and these state agents appoint a subagent, and they sell this Brady System.

Q. What is the thing they actually sell? A. It is an underground gasoline tank. It contains from 280 939
to 1,000 gallons, with a register, a gauge, indicating automatically the quantity of gasoline put into this underground tank, and the quantity that is taken out.

Q. Is this commonly known as a curb pump? A. Yes.

Q. Used for the sale and distribution of gasoline? A. Yes. The system complete is made up of this underground tank and a pump, either a hand pump or an electric pump, encased in a tower or stand that is erected on the curbs, or on corners, or wherever you choose to put them.

940 *Lawrence MacRae, Direct*

Q. To whom do you sell them? A. You mean through whom we sell them?

Q. To whom? A. We sell them to stores; a large part of our trade is with country stores, various general merchandise stores, drug stores and hardware stores, largely on highways, thoroughfares. We also sell them to the city trade, garages, and some stores in cities to filling stations to a small extent.

Q. Are you acquainted with the Gilbert & Barker pump? A. Yes.

Q. The Bowser, and the Wayne, of Cincinnati?
941 A. Yes.

Q. Are you in competition with those concerns? A. Yes.

Q. In the conduct of your business have you shipped your equipments from one state to another? A. Yes, all shipped from Louisville, Kentucky.

Q. They are all manufactured there, are they? A. Except the tanks. I understand they are being manufactured now in other states.

Q. In what states? A. In other states, Missouri, for instance, Ohio.

Q. Are you acquainted with the general practice used by a number of oil companies of leasing and
942 loaning such equipment? A. I am generally acquainted with it. I have never seen a contract.

Q. But you are acquainted with the practice? A. Yes, sir.

Q. In the course of your business have you had occasion to meet it with various purchasers and prospective purchasers, the general retail trade? A. I have in a limited personal way. My associates and our salesmen have reported instances where they have come up against that competition.

Q. In that connection have you ever lost customers or prospective customers because of your practice of leasing and loaning such equipments?

Mr. Speer: The question is objected to as immaterial, incompetent and irrelevant.

Examiner McCorkle: Note the objection. The witness may proceed.

The Witness: Yes, I have.

By Mr. Zechiel:

Q. State more in detail your general experience along that line. A. I have in mind an instance where I personally came in contact with such competition. A few weeks ago a couple of gentlemen came into my office and said they were interested in buying for 944
their firm one or more of our systems, that they had selected it as being just what they wanted and what their principal owner preferred to buy. Well, after an hour or so talk they wanted to know if I could obtain an immediate, quick prompt shipment. I said I would wire the factory. I wired the factory and got an answer that day. The next morning I went around to see the head of the firm—his representatives had left the city. "Why," he says, "I can get that, I have been promised that pump by an oil company, that they would give it to me," he said. He took hold of the 'phone and called up an oil company, and from the conversation I judge he had made the deal 945
with them.

Q. Do you know what company he called? A. He said he called the Standard Oil Company.

Q. Do you know as a matter of fact what Standard Oil Company is operating in that territory? A. I do know that they sell their product in that territory.

Q. Do you know the name of the Standard Oil Company that is operating in that territory? A. No, I do not. The Standard Oil Company is only known to me as the Standard Oil Company.

946 *Lawrence Mac Rae, Cross*

Q. What other experiences along that line have you had? A. Our manager in Virginia, Mr. C. V. Kuester, reports that practically all of the gasoline dealers in Danville and in other cities in Virginia do not own their dispensing equipment. The same report comes to us from our South Carolina representatives.

Q. Have you lost customers or prospective customers from that practice in those territories, if you know? A. I cannot say specifically in either of those states that we have lost them. I know this, that our representative goes down and he comes back and
947 says that he cannot do anything with the man who can get a tank and pump simply by asking for them.

Q. And that same experience is general over your territory? A. It is reported from Ohio, also.

Mr. Zechiel: That is all.

CROSS-EXAMINATION by Mr. Speer:

Q. Does your firm sell pumps direct to oil companies? A. We have never sold any so far. We do not sell them.

Q. Your policy is to sell the pump direct to the user of it through your salesmen? A. Yes, that is
948 our practice.

Q. And do you not sell to local dealers for resale, or anything of that kind? A. No, sir; we do not.

Mr. Speer: That is all.

By Mr. Nesbitt:

Q. Just one question. Have you ever made an effort to reach the oil companies to sell them in any way? A. No, we have not, except through our factories. They handle sales of that character.

Q. I am not quite clear. You are in the jobbing business, are you? A. Jobbers.

Q. You do not have a factory? A. Do not own a factory.

Q. I see. Then your organization is a sales organization? A. Absolutely.

Q. That organization has never made an effort to market with the oil companies direct? A. We have never made an effort to market with the oil companies.

Q. You have never made an effort to market with the oil companies direct; is that right? A. That is correct.

By Mr. Speer:

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Q. And so far as you know the manufacturer of these pumps may sell them direct to the oil companies? A. Possibly so.

Q. And for all you know those oil companies may lease or loan some of these same pumps in which you are dealing? A. Possibly they are, yes.

By Mr. Nesbitt:

Q. Are there any of those pumps to your knowledge that are loaned and leased at a nominal rental? A. Not one.

Q. How many kinds of these visible pumps are manufactured? A. I think we come in competition with some five or six. 951

Q. You do not know then positively, do you, that none of your kind, not one of your kind of pumps, is leased at a nominal rental anywhere, do you? That is, you never have made an investigation as to that? A. No, I have never made an investigation.

Mr. Nesbitt: That is all.

By Mr. Speer:

Q. Have you exclusive right in your territory for the sale of these equipments? A. We have exclusive rights.

952 *W. J. Metzel, Direct*

Q. And the manufacturer could not sell a customer in your territory except through you, according to your contract? A. That is true.

Mr. Speer: That is all.
(Witness excused.)

Thereupon, 4:40 o'clock P. M. the hearing was adjourned until tomorrow, Tuesday, November 25, 1919, at 10 o'clock A. M.

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Washington, D. C., Tuesday, November 25, 1919.

Met at 10 o'clock A. M. pursuant to adjournment.

Before: Examiner George McCorkle.

Appearances, as before noted, and the following additional appearances:

Mr. J. H. Hayes, on behalf of the Standard Oil Company of New Jersey.
Mr. Yale L. Schekter, in behalf of Atlantic Refining Company.

954

W. J. METZEL, was called as a witness, and being first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. State your name, please? A. W. J. Metzel.
Q. What is your address? A. 4110 Keyser Bldg., Baltimore, Maryland.
Q. With what concern are you connected? A. The Red "C" Oil Manufacturing Company, Baltimore.
Q. What is your position with that company? A. Traveling salesman is my official title.

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Q. How long have you been connected with the Red "C" Company? A. Since June 1, 1890.

Q. What have been your various employments in the meantime? A. I have been connected with the selling and marketing of oils.

Q. So that in the course of your experience you have had occasion to travel about over the territory? A. Yes, I am continually traveling, all the time traveling.

Q. What is the general territorial extent over which the Red "C" Oil Company does business? A. Southern Pennsylvania, Delaware, Maryland, Virginia, West Virginia and North and South Carolina is our principal territory.

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Q. In the course of your business do you ship your products back and forth from your main office or one plant and these various stations, or how do you handle your business? A. We supply stations from Baltimore sometimes, sometimes from the refinery of the Oil Petroleum Company, at Pittsburgh, and some other sources.

Q. What is the product which your company handles? A. Illuminating oils, gasoline, benzine, lubricating oils, a general line of oils everything made out of petroleum.

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Q. In connection with your business do you also deal in oil tanks and pumps used for distributing these products? A. Yes, sir, we sell them.

Q. How long have you been engaged in that branch of the business? A. Well, I suppose fifteen or twenty years. We have been selling pumps occasionally.

Q. And in the sale of these pumps is it your business policy to sell them at a reasonable profit on the transactions with respect to the pumps? A. Yes, we always sell them at the manufacturer's price, what

the manufacturer of the pump would sell it to the buyer.

Q. Which would generally be known as the retail price, do you mean—the manufacturer's retail price? A. Yes, the manufacturer's retail price. We always maintain that and we try to make a profit on the tank.

Q. Do you in connection with your business ever lease or loan such equipments? A. We have been compelled to do it occasionally, yes, sir.

Q. How long have you been engaged in the leas-
959 ing and loaning of these equipments? A. I suppose about seven or eight years, possibly seven or ten years, but most of them in the last few years.

Q. And during that time when you have been leasing and loaning, have you also sold pumps and tanks? A. Oh, yes, we sell them whenever we can.

Q. About how many pumps has your company sold in the last four or five years? A. Sold?

Q. Yes. A. I could not say; I don't know.

Q. Could you say how many you have sold compared with the number you have leased, approximately? A. I should say we sell twenty-five pumps to one lease.

960 Q. How many leased contract pumps have you under installation now? A. In my special territory where I travel there are about a dozen.

Q. What was the occasion of your beginning the leasing business in the pump game? A. In order to hold the customer's trade. Other concerns would come along and make the proposition to loan a pump and tank. We would try to sell the man the pump and tank and very often would succeed in doing it, but when he would not buy it, why, as a last resort we would then loan it to him when we could not hold his business without that.

Q. Who are your competitors? A. The Standard Oil Company, the Gulf Refining Company.

Q. What Standard Company is that? A. The Standard of New Jersey; the Gulf Refining Company, the Texas Company, the Indian Refining Company, the American Oil Company of Baltimore.

Q. When you speak of your competitors offering to lease or loan these equipments to your customers, are you referring to all these customers? A. All but one, all but the Indian Refining Company.

Q. How did you become acquainted with the fact that your competitors were offering to lease and loan 962
these equipments? A. From the customer.

Q. How did that arise? A. He would tell one of our drivers, or tell me on my visits, or would write to the company, that he had been offered a free pump and tank outfit if he would sell nobody's else gasoline, but did not want to quit us, and if we would do the same thing he would keep on buying our gasoline.

Q. Did you ever lose any customers because of that practice? A. Yes, quite a number of them; yes, sir.

Q. Would you say you have lost a small or large 963
amount of business because of that sort of practice on the part of your competitors? A. Quite a good deal of business; we would lose sometimes the whole business in a village or town.

Q. Because of that practice of your competitors? A. Yes.

Q. You also sell lubricating oils to the same customers to whom you sell your gasoline? A. Yes, sir.

Q. Who in general are your gasoline customers? A. The garage trade are the principal customers, then

hardware stores, drug stores, druggists like to have an outfit on the outside to attract tourists so as to sell their soda water, toilet articles, and so on. The pump attracts them for gasoline, and while their tanks are being filled they hope to interest them in other stuff. Mostly of course, the gasoline is sold from the garages.

Q. Then your trade in the sale of gasoline is very general to all the retailers of that product? A. Yes, sir.

965 Q. Have you sold your pumps in a general way to the same trade? A. Yes, sir.

Q. You have leased and loaned generally to the same trade? A. Yes, when we were compelled to do it in order to hold the customer.

Q. Have you ever lost any of your lubricant business because of this practice of leasing and loaning of gasoline pumps? A. Very often, yes, sir. The company would get the good will of the prospective customer, and say, "We will install you a large tank and pump for gasoline," and he would sign the contract, which would cause him to buy all of his gasoline from this company. Then as a side agreement with the salesman, "Now, we are giving you this out-
966 fit free of cost and we are installing the tank ourselves. Now, you must give us the preference on lubricating oil and on your coal oil." The consequence is that on a good many occasions we would lose out on all of his business.

One customer I can refer to particularly. I got half of his coal oil business, half of his gasoline business. He had his own equipment, his own coal oil tank and own gas tank. His gasoline tank was small size, only held about 200 gallons. He would run out and we would have a good chance to fill it up, the

same as our competitor. That did not suit a competitor and he went to him and offered him a large underground tank and pump, enough to keep him going for several days between trips, if he would buy all of his gas from them. Well, he told our driver about it and wanted to know if we would put in one. We said no, we would not, that we did not do that kind of business very seldom. So he took the pump and tank from the Standard Oil Company. On one of my visits along there shortly after that, he had stopped buying his coal oil from us, and I said, "Why don't you buy coal oil from us?" He said, "The salesman told me if he gave me this tank and pump that he would have to have the coal oil business, too." That was not incorporated in the contract, but his coal oil and also his motor oils was a gentlemen's agreement on the side with the salesman, that that part of the business would go with it. 968

That very often happens. In some cases we are able to sell them lubricating oils and coal oil, outside of the pump contracts, but it generally goes with it.

Q. What is your experience in the conduct of business in your territory? Do the retailers of these products generally have more than one installation on a particular piece of property? A. Yes, where a retailer has a pretty big distribution, why he will get pumps from two concerns, or he will get two pumps from one concern. One of my customers had two five-gallon stroke pumps with large tanks, each one of them right at the intersection of a cross road. His building is on the corner, and he has a five-gallon stroke pump, a Gilbert & Barker, on one side, and another on the other side. He runs a little hardware business. 969

Q. You say they are both pumps furnished by your company? A. No, by the Standard Oil Company.

970 *W. J. Metzel, Direct*

Q. In a general way what per cent of the retailers, large and small in your territory, have more than one installation? A. It is a small per cent that would have more than one installation, very small.

Q. And of that small per cent you speak of that have more than one installation, what per cent of that small per cent actually buy gasoline at the same time from two different companies? A. Well, they are not many; very few. We had put in a pump at Shepherdstown, West Virginia, the Shepherdstown garage, in order to hold our gasoline business. They pre-
971 ferred it but they said if we did not put it in they would get the Standard Oil Company to put it in. We put it in. After we run our pump there for a couple of years, the Standard Oil came along and dickered with them until they got their consent to put their pump on the other corner of the garage, opposite from ours, at that same place, so as to divide up our gasoline product with that garage.

Q. So far as you know in your territory has that sort of thing happened frequently? A. Right frequently recently, in the last year. There is a case going on right now, at Edinboro, Virginia, where
972 we had a pump in. The man told us we would have to put in a pump if we wanted to get his business. It had not been there three weeks, before he installed a five-gallon stroke pump, and told us we would have to move our pump, that he wanted to put that five-gallon stroke pump where our pump was setting.

Q. Was that a pump he had bought? A. No, sir, it was loaned to him by the Standard Oil Company without any cost, and they agreed to dig the hole and plant the tank for him besides.

Q. And would you say on the whole that the result of leasing and loaning oil tanks and pumps to

retailers, that the result of that is that such retailers buy their product entirely from the company leasing the gasoline equipment? A. Largely so, yes, sir; they get the preference. The only way the other fellow can sell him gas is to come along and cut the price of the other fellow, to get in.

Q. Well, where there is a lease and loan equipment, would that method be successful without installing another pump? A. Not unless he has some other outside storage capacity of his own—you can't sell him at all.

Q. And is that common, or not? A. Not very, no, 974
sir. When he gets an old pump that is out of date he disposes of that, when he gets a new outfit, and he has not any other storage. The only way you can put anything in there is to bring the tank along with you and put it in and try to cultivate his good will to give you a little show, a little preference.

Q. In your experience in the sale and distribution of gasoline and lubricating products generally, do you think this practice of leasing and loaning oil tanks and pumps for a nominal consideration, under a condition or understanding that the lessee is to use in connection with such equipment only the gasoline of the party furnishing the equipment, is a good busi- 975
ness practice?

Mr. Speer: The question is objected to as incompetent, immaterial and irrelevant.

Examiner McCorkle: Note the objection. The witness may proceed.

A. No, it puts the buyer under an obligation to a concern that he is accepting those favors from, and destroys his commercial liberty, and he is tied up to buy his products from that concern. He is under a contract very often, and under a moral obligation, to

buy all or most of his oils and gasoline, and so on, from the company that installs this equipment.

By Mr. Zechiel:

Q. Are you acquainted with the practice of entering into agency agreements with certain retailers of gasoline whereby the retailer is made an agent and the equipment is furnished by the oil company? A. Yes, sir, I have known instances of that, in order to get the custom or the trade of a certain customer, they install the equipment; then appoint him as
977 their salesman to sell himself. I know of one instance in Baltimore where he got $75 a month salary for selling himself gasoline that he bought from a certain company.

Q. Your company has never practiced that sort of business? A. No, sir.

CROSS-EXAMINATION by Mr. Hayes:

Q. What is the name of your company? A. The Red "C" Oil Manufacturing Company.

Q. How long have you been engaged in the oil business? A. The company?

978 Q. Yes. A. It was incorporated in 1878.

Q. No, I am speaking about you? A. Me?

Q. Yes. A. I have been with the Red "C" Oil Company since June 1, 1890, continuously.

Q. Is it a general practice of all oil companies to lease and loan pumps in the manner which you have testified here this morning? A. As far as I have come in contact with them, they have, with the exception of one concern.

Q. That is the only exception where they do not engage in the uniform practice of leasing and loaning pumps? A. Yes, sir.

Q. Have you seen the form of contract used? A. I have seen them, yes, sir.

Q. Does that contract provide that the lessee shall use no other gas in his garage except that of the lessor? A. The contract says that he shall use no other gasoline in that pump outfit.

Q. In the pump outfit? A. Yes, sir. If he does he is given fifteen days' time to quit buying the other fellow's stuff, or lose his pump.

Q. You say you sell your gas and products wherever you can find a customer? A. Yes, sir.

Q. Wherever you yourself can find a customer? 980
A. Yes, sir.

Q. And you sell about twenty-five pumps to one that you lease? A. I think that is about the average.

Q. And that average has continued for how long? A. It has only been in the last couple of years. Prior to that it was the rarest thing we ever would loan a pump, maybe not but one or two in a year.

Q. What kind of pumps do you use? A. Why, I have a catalog from four different manufacturers of pumps. We give the man whichever he prefers.

Q. You give the man the pump he wants? A. Yes. I have manufacturers' catalogs and prices with me, and let him have his choice. 981

Q. Do you order that pump from the main office of the pump company, or through a local salesman? A. If the tank company has a local agent in Baltimore we generally order from him; but if not we send the order direct to the factory, and the factory ships direct to the customer.

Q. Your business has increased during the last couple of years over what it was previously? A. We are selling more stuff than we used to sell.

Q. Has the business of leasing pumps injured the amount of gallonage that you sell per year of gasoline? A. Injured it?

Q. Yes. A. No, sir, it has increased it. We would not put them out if it did not.

Q. With reference to this five-gallon pump down in Virginia, what kind of pump was that? A. A Gilbert & Barker pump.

Q. Did I understand you to say Bowser? A. The one that we put in?

Q. This five-gallon stroke pump down in Virginia. You said in your direct-examination a five-gallon Bowser pump. A. A five-gallon stroke pump.

Q. But you said Bowser. Did you mean Gilbert
983 & Barker? A. Yes, sir; it was a Gilbert & Barker pump that went in there.

Q. It was not a Bowser? A. No, sir; it was a five-gallon stroke pump. That is what I thought I said.

Q. Where was that place? A. Edinboro, Virginia.

Q. When was that? A. About thirty days ago.

Q. Thirty days ago? A. Yes, sir.

Q. Can you say how many pumps you have seen put in under those arrangements down in your territory in the last year? A. Alongside of where we had one, you mean?

984 Q. Any place? A. How many free installations there have been?

Q. Yes. A. I could not begin to count them. They are too many.

Q. You could not begin to count them? A. No, sir.

Q. You have at the same time put in your pumps also on a similar arrangement, or have you sold most of yours? A. We have sold most of ours. We only have six pumps working in the Valley of Virginia.

Q. You have not had much difficulty, then, in selling your pumps, have you? A. No, we can sell them most every time.

Q. You are a good salesman. That is all.

By Mr. Speer:

Q. Would it help the situation any from your point of view if the companies instead of leasing and loaning the pumps would place them by good agency contracts, such as you have mentioned? A. How is that?

986

Mr. Speer: Read the question.

(The pending question as above recorded was repeated by the stenographer.)

A. I don't know what you mean by agency contracts.

Q. You have mentioned cases where instead of the company leasing and loaning the pumps to the operators installed the pump and made the operator their agent? A. Oh, yes.

Q. And paid him a salary or commission to sell the oil in that way, making it a substation or agency station. Instead of leasing and loaning the pumps, the agency system was adopted. Would it help the 987 situation any from your standpoint? A. Not if the outfit sold belonged to the oil company that made the agency proposition, not a bit.

Q. I am assuming of course that the company is making that a substation, an agency of their own, that they have the equipment and are employing the operator to sell for them? A. I don't see where it would alter the conditions at all, because he would still be tied up with the company that furnished the equipment or made the agency.

988 *W. J. Metzel, Cross*

Q. Then you say that is equally as bad a practice as the leasing and loaning? A. Yes, sir, I cannot see a particle of difference.

Q. Do you mean to say that a marketer who is manufacturing gasoline and selling it to the public, has not the right to establish an agency for the sale of his product to the ultimate consumer? Do you say that is a bad practice? A. He has got the right to sell his stuff wherever he can.

Q. Yes. A. But he has not any right to tie the fellow up so that he cannot buy someone's else gas.

989 Q. If it is his agency, if he owns it, and has the man in his employ, he has the right to have such a station, I take it, even from your standpoint? A. No, sir; it ties the man up so that he can't handle the other fellow's gas.

Q. That is the purpose of it, to make a place where the marketer will sell his product to the public; is not that the purpose of it? A. Yes, sir, that is the idea of it.

Q. Has he not as much right to make a small agency like that, where it will accommodate the traffic going along the road, as he has to put in a large service station and expend a lot of money?

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Mr. Burdeau: That is a legal question. Everybody can see that.

Mr. Hayes: You have been asking legal question, and I want to test his knowledge of the law.

Mr. Zechiel: Go ahead.

Mr. Speer: Read the question to him.

(The pending question was repeated by the stenographer as above recorded.)

The Witness: Not if that man is in a general business where he is selling all kinds of gas, because

he has some customers that want somebody's else make of oil or gasoline. If you start the place and put a salaried man of your own there where he don't sell anything but gasoline and lubricating oil, that is your own business. But when you get a garage man who is selling all kinds of goods, tires, accessories, and everything, and you make him your agent, then you are interfering with his commercial liberty, when you don't allow him to buy gas from anyone else.

By Mr. Speer:

Q. So far as the gasoline is concerned? A. Gaso- 992
line and oils, yes, sir.

Q. Is not this your theory, that the large marketer of gasoline should sell to the local retailer and allow him to take any pump he pleases, to buy from whom he pleases, and let that man, the garage man, or whatever you call him, or the local retailer, let him supply the automobile people and the ultimate consumers? A. Yes, sir.

Q. That is the only way that the business ought to be conducted? A. Yes, sir, and not to sell the consumer at all.

Q. You say the large marketer should not bring 993
his gasoline and sell it from small stations to the owner of the automobile? A. No, I did not say that.

Q. He should be compelled to deal through the local retailer? A. No, sir, I did not say that at all.

Q. If he is going to sell to the automobile man, the ultimate consumer, is it not necessary that he have a number of small stations along the road? A. Yes, sir.

Q. Where the driveway goes? A. Yes, sir.

Q. If he puts in a small station like that, and makes the man his agent, that is then an agency contract, is

it not? A. And makes the man that is in business there his agent?

Q. Whether he is in business or not? A. If he is engaged in a general line of business you are interfering with the other fellow selling him, too.

Q. Even if he is not engaged in any other line of business, if here is a corner that is a good place to sell gasoline, with automobile people driving along the road— A. Yes, sir.

Q. And the marketer goes and puts a little filling station there and hires a man to run it, he sells nothing but his gasoline there, does he? A. That is, if there is nothing else sold there but gasoline and oil; but if he has got a store or business there, selling general merchandise, or something like that, then you are tying him up so he can't buy stuff of somebody else.

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Q. Only in gasoline? A. Yes.

Q. The man that is not selling anything else is tied up so he can only sell gasoline? A. He is not trying to sell anything but gasoline, no, sir.

Q. You mentioned that you have leased this equipment to retailers who were going to put out the tank they had when this lease was granted to them. Was that a tank of yours they had in? A. No, sir, it was an old antediluvian tank that had been used for a long while that was not sufficient for his present needs.

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Q. You had been selling him gasoline? A. Yes, sir.

Q. You had been selling him all he used? A. Sometimes.

Q. Is that not a fact that you would wish to make a man a regular customer if you are going to supply him, so that you would know his needs and would

send out your tank wagon expecting to supply him from day to day? A. In all cases like that I would sell him a larger tank, a larger pump. I would not go and offer to give him one because that would not be my way of doing it.

Q. That is a fact, though, is it not, that before you began this leasing, that your customers as a rule took no gasoline but yours? A. No, sir, not entirely so. Sometimes we get a division of the business; sometimes we get it all and sometimes we get part of it.

998 Q. Is it not very unsatisfactory to be furnishing through a tank wagon gasoline to a man with a filling station who today takes yours and tomorrow takes somebody's else? A. No, sir.

Q. And you never know whether he needs any or not? A. He can always 'phone whether he wants it or not. That is the way I would like to see it done, where a man is a free agent and can buy from the fellow who comes along. I will take my chance of getting the business against anybody.

Q. As a matter of fact you are able to get the people who are dealing with you to take your gasoline practically exclusively, or you were, until this loaning system began? A. We could get all the business we 999 could take care of, yes, sir.

Q. You have not answered my question yet. It was a fact that the people you were furnishing gasoline to were taking from you as a rule exclusively—as a rule? A. Part of the time that way, yes, sir. I don't know as a rule, no, sir. We would get a division of business in most instances. We did not have all the man's business as a rule.

Q. Is it not a fact that you leased some pumps to retailers, garages or others, who had no pump at all, that you were starting in business? A. Yes, we have

done that in order to get business because he said he was going to buy his gasoline from the company that did do it.

Q. That was a new business instead of an old business? A. I reckon it would be.

Q. You testified in chief you had to do this to hold business, but as a matter of fact it is done just about as much, is it not, to get new business as to hold old business? A. When a new concern starts up he don't think of buying an outfit any more. The outfits have been handed around so generally that he don't have
1001 to buy one.

Q. When a new oil company comes into your territory to compete this is the method by which they generally succeed in establishing the trade, by loaning the equipment to a new garage that is being started up? A. Yes, sir.

Q. And it is mostly to the new places that they succeed in making the loans, rather than going to old places and getting them to take out their old tanks? A. No, sir. In the case of a man who has got a garage on this corner (indicating), and he has an old outfit, and a new concern starts over there (indicating), and he gets a new outfit, this fellow over here
1002 wants a new outfit, and the concern that puts it over there puts it over here.

Q. These new outfits have a new way of distributing gasoline? A. No, sir, the same way, the same tank and pump, only it is painted new and looks better. The old pump works as good as the new.

Q. Probably the other one does not work so well, being old. A. Yes, it works all right. But if you can get in a new pump there it pleases him, and he will tie up with you and you will get his business. The old pump belonged to himself and everybody had a shot at

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his business, but the concern that goes in and puts in a new pump, nobody gets his business but they.

Q. Are there more oil companies operating in your territory than two years ago? A. Yes, sir.

Q. The number of companies operating and selling gasoline has increased in the last few years? A. Yes, sir.

Q. That increase has been since this leasing and loaning system came into vogue? A. Yes, sir.

Mr. Speer: That is all.

1004

By Mr. Nesbitt:

Q. The Red "C" Oil Company has been doing business for how long, did you say? A. It was incorporated in 1878.

Q. There was a time, was there not, when the Red "C" Oil Company, in part of the territory where you are now doing business, have practically all the local trade; is that true? A. In a good many cases we had.

Q. You were very strong in the territory through the states that you mentioned? A. Yes, sir.

Q. And in a good many of those localities you were the only company doing business? A. No, sir. I never struck a place in the world that I did not run against the Standard Oil.

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Q. Have there not been sections in the State of Virginia and North Carolina since you have been connected with the Red "C" Oil Company where that company was the only company doing business? A. No, sir. There were a good many cases where I got it all away from the other fellow.

Q. And you had the whole business there? A. Not all of it; I had most of it.

Q. Practically all of it? A. Most of it, but the other fellow was working there all the time. He had a station on the spot.

Q. Did the Red "C" Oil Company during your experience with it ever make any contracts with customers for the sale of gasoline covering a period of time? A. Not for ten years or longer.

Q. You don't have any— A. We cut out gasoline contracts at the same time the Standard cut them out, because if they did not know what the price was going to be we knew we did not. (Laughter.)

Q. Do you know that the Standard does not have any contracts for the sale of gasoline in your territory? A. They have contracts for the sale of gaso-
1007 line but the price is left open. In these pump arrangements the man signs up to use the gasoline from them but the price is open, no market price specified—the market price.

Q. Do you know that to be a fact? You saw those contracts? A. The contracts, yes, sir.

Q. Have you ever seen those contracts? A. I have looked at them, in a way. It says they shall not put any gasoline in this pump but Standard gasoline. "If you do we will take it away from you."

Q. But you never saw a contract that provided that all of that gasoline should be bought from the company furnishing the pump A. All the gasoline he
1008 used in that tank.

Q. But not all the gasoline that was dispensed from that station A. It did not tell the man he should not buy somebody's else gasoline, no, sir, but said that all the gasoline that he sold from that pump should come from the Standard.

Q. Why, was it, Mr. Metzel, that you dropped the practice of having customers sign written contracts for the purchase of gasoline covering a period of time? A. Why we did it?

Q. Yes. A. It has been a long time ago. Well, because we did not know what the price was going to be.

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Q. You wanted to get the advantage of the price, of a change in price? A. It was just this way. The gasoline contract, and every other oil contract I have ever seen, was all one sided. You can make a man a price of so many barrels of oil to cover a certain period. If the price goes up he has got it bought, and if the price goes down you give him the benefit of the drop. It is all a one-sided arrangement.

Q. Do you endeavor to reach the ultimate consumer in your sales of gasoline? A. No, sir; we only sell the retailer.

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Q. Your business is a jobbing business? A. Yes, sir, a jobbing business.

Q. You don't endeavor to bring your company into direct contact with the consumer? A. Oh, yes; we advertise to the consumer.

Q. Oh, yes, you advertise. A. Our products, and that a man can get them from such and such a dealer.

Q. But you don't deliver direct to the consumer? A. Unless some one got down and out of a supply and asked the tank wagon to deliver them some on the spot, but we don't solicit that.

Q. What are the facilities for distributing the gasoline that you principally rely on? A. Tank wagons, motor delivery. The drum shipments are out of date. 1011
People won't handle drums. You can't deliver gasoline in drums any more; people won't bother with them. There is a universal tank service everywhere from some one or other and you don't have to buy it in drums.

By Mr. Speer:

Q. You mentioned that the Standard Oil Company were operating in your territory. What Standard Oil Company do you mean? A. Of New Jersey.

Q. The Standard Oil Company of New York does not operate in your territory? A. Not direct. I see

some of the Standard Oil Company of New York labels on some of the barrels of stuff that the Standard of New Jersey ship out some times.

Q. Oh, well, that is on the barrels going through? A. Yes.

Q. So far as operating and marketing— A. No, I do not get into their territory, just the Standard Oil of New Jersey and the Atlantic Refining Company.

Q. What other company do you see? A. The Texas, the Gulf, the Ohio "C."

1013 By Mr. Hayes:

Q. Do you strike the Sinclair? A. No, sir.

By Mr. Speer:

Q. There is plenty of competition? A. Yes, the woods are full of them.

RE-DIRECT EXAMINATION by Mr. Zechiel:

Q. Are you in competition with the Atlantic Refining Company? A. Yes, sir.

Q. Did you say that your business as to gallonage has increased because of this practice of leasing and
1014 loaning equipments, or because of the general increase in demand on the part of the public? A. Mostly the increased consumption of gasoline.

Q. You do not attribute the increase of gallonage in your business to the leasing and loaning of oil tanks and pumps? A. No, sir, that is not the principal cause of the increase. That is only done in our instance to save fragments, to save what we have got.

Q. Why don't you enter into the agency agreements? A. We have not got unlimited money to put down tanks all over the country.

Q. You have some lease and loan agreements? A. Yes, we have a few.

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Q. Is there any reason why you prefer lease and loan agreements to the agency agreements? A. I cannot see any difference between the two. I may be a little dull of comprehension on that point, but I don't see where the difference is.

Q. Put it this way: Would you just as leave have a tank or pump installed with a retailer under an agency contract with the retailer as to install it under a lease agreement? A. The lease agreement is more satisfactory because he pays for the gasoline when it is put in his tank. Under the agency agreement he only pays for it when he puts it out through the motor, and 1016
he settles every Saturday night for the quantity he has sold during the week.

Q. Which involves less bookkeeping and sales troubles, the lease contract or the agency arrangement? A. The lease arrangement is less troublesome than the agency arrangement.

Q. Do you believe that if the lease agreements were interfered with and the oil companies were to quit leasing and loaning pumps, that there would be an equal amount of business done by agency agreements as is now done by lease and loan agreements? A. There are not any agency agreements that are made any more. That old commission proposition of a cent 1017
or two cents a gallon to the agent has been cut out. I don't know of any of those existing now. There are not any commission sales going. Every Standard Oil tank that I know of, it is on a straight out sale. They do not work the commission plan any more. It was done away with a year or two ago because it was unsatisfactory; it always caused a dispute between the purchaser and the seller.

Mr. Zechiel: That is all.

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By Mr. Speer:

Q. In other words the lease and loan method has superseded the agency system? A. Yes, sir.

Q. The agency system was in vogue before the lease and loan system was adopted? A. Yes, it has been done away with.

Q. But the Atlantic did have those agency contracts all through the territory? A. Yes, sir.

Q. But don't you say the lease and loan system is more satisfactory for many reasons? A. More

1019 satisfactory than the agency, yes, sir. You get paid for the gasoline when it goes into the man's tank.

By Mr. Zechiel:

Q. Did the Atlantic Refining Company, or any other oil company, ever have installed as many agency arrangements as there are now lease and loan arrangements? A. No, they have increased and multiplied. The old agency arrangement has been transferred to lease and loan.

Q. No; I am asking you whether if at any time the Atlantic ever had as many agency contracts, or any other oil company, with the retailers, as they now have lease and loan contracts.

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Mr. Speer: We object to that, because evidently it follows. The witness says the agency contract has been done away with and they are using this other system.

The Witness: No, the lease and loan business was the outcome of the agency contract. The pump was put in and the man was told he would get so much per gallon to sell the goods, to sell the gas.

Mr. Zechiel: I don't think the witness understands my question. Let me ask it this way.

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By Mr. Zechiel:

Q. Are there more lease and loan agreements in effect now than there were before the lease and loan agreements were adopted? A. Oh, yes, a great many more.

By Mr. Nesbitt:

Q. Has the lease and loan method brought competition into your territory? A. Yes, sir.

By Mr. Schekter:

Q. Do you know the proportion of sales made by the Atlantic Refining Company to leases and loans? I mean the proportion of sales of pump equipment? A. Indeed I could not tell about their business. 1022

Mr. Schekter: Mr. Examiner, may I ask whether the witness has stated any specific instances of complaint against the Atlantic Refining Company?

Examiner McCorkle: We could not go into that.

Mr. Schekter: You cannot go into that?

Examiner McCorkle: No.

Mr. Zechiel: As a matter of fact there have been no specific instances cited of that sort. 1023

Mr. Schekter: That is all, then.

(Witness excused.)

C. B. MATTHEWS was called as a witness, and being first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. State your full name? A. C. B. Matthews.

Q. Your address? A. 77 Main Street, Buffalo, N. Y.

Q. With what company are you connected? A. The Buffalo Refining Company and the Warren Oil Company of New York.

Q. What are your positions with those two companies? A. I have been for many years the president and manager of the Buffalo Refining Company, and in the other company I am simply a director. My son is the president of the Warren Company.

Q. How long have you been in the oil and gasoline business, in a general way? A. In the oil business in one way and another some forty years.

1025 Q. In the sale and distribution of gasoline and oil products generally, how long have you been in that phase of work? A. The oil products generally for about thirty-five or forty years; with the gasoline proposition not over eight or nine years.

Q. What is the general territorial extent of your business? I am speaking now of the Buffalo Refining Company? A. As far as gasoline goes I think we have nothing outside of New York State, except a little proposition in Canada, across the river.

Q. And in western New York? A. Yes, sir.

Q. In and about Buffalo? A. Well, we have stations from Buffalo east to Albany. We have about

1026 twenty stations.

Q. And the company of which you are a director, what is the territorial extent of its business? A. Principally New York, in gasoline.

Q. Do you do business in some states besides New York? A. We have recently bought a refinery in Illinois, and we have been doing business in fuel oil and other goods in quite a number of states.

Q. But not in gasoline? A. No, sir.

Q. In connection with your business do you handle oil tanks and pumps used in the distribution of gasoline products? A. Very little, indeed.

Q. How long have you been engaged in that phase of it? A. Not over three or four years.

Q. And in that respect do you sell such equipments? A. We have in a very small way.

Q. Do you lease or loan such equipment? A. No, sir, we have no arrangements of that kind with anybody.

Q. Have you ever had such lease arrangement with anybody? A. In a very small way up to within perhaps a year and a half or two years.

Q. You are acquainted with the leasing system, generally known as the leasing system of pumps where 1028
certain oil companies lease and loan such equipments for a nominal consideration, under an agreement or understanding that the user thereof shall not use in connection with the pumps gasoline products of any competitor or any other oil company except the party who leases such equipments? You are acquainted with that phase of the business? A. Certainly.

Mr. Schekter: I want to offer my objection to that, as being grossly leading, and not based upon the facts as they exist. I think the witness ought to be asked to testify and not be led.

Examiner McCorkle: Note the objection. Do not lead him any more than can be helped. 1029

By Mr. Zechiel:

Q. Go ahead? A. Will you repeat the question?

(The pending question was repeated by the stenographer as above recorded.)

A. I am.

Q. Has either of the companies with which you are connected ever lost business because of this business practice as indulged in by any of your competitors? A. We have.

Q. To what extent has that been true? A. Not to any very large extent.

Q. You mean that you have not lost much business because of that practice? A. Yes.

Q. Who are your competitors in your territory? A. Almost all the big concerns, beginning with the Standard, running through with the Texas, the Gulf, the Sinclair, most everybody in that territory that operates.

Q. Do you know whether these concerns you have named, any of them, use as a business method this
1031 leasing and loaning arrangement to which you have testified? A. Yes, sir, some of them have.

Q. What companies? A. Principally the Standard of New York.

Q. Do you know of any other companies? A. Not personally, no.

Q. In your experience, in connection with your business, do retailers of gasoline products in your territory have installed more than one such pump equipment in one place of business? A. I do not know of any.

Q. Where there is more than one? A. More than one.

1032 Q. Have you ever tried to sell your product to a garage where there is a lease and loan installation? A. Yes, sir, we have.

Q. Have you ever been successful along that line? A. No, sir, not in any permanent way. Some times they would buy of us if they were neglected and out of gasoline, from the parties that they had the contract with. I have in mind an operator in Buffalo that had an agreement of recent date with the Standard, and perhaps this was entered into not over three or four weeks ago. They began to supply him, and he was out of gasoline two days in succession, and he urged

them to supply him, and they did not find it convenient or in other words they found it more convenient to supply those stations which they operated directly, so that he was without gasoline, and he went right ahead and installed a plant of his own, a pump and tank, and he was sufficiently forehanded to go ahead and not be obligated to anybody that was going to tie him in that way and then neglect him after they got him tied.

Q. What was the occasion of your beginning the practice of leasing and loaning such equipments? A. It was to get into some places where the practice ob- 1034
tained by other companies.

Q. Do you mind explaining that a little more fully, your expression to get into places? A. We never did it except where parties were not fully satisfied with the treatment they had from the companies they were contracted with, and if we would loan them a tank they would buy of us. But we never had an agreement, however, binding anybody to buy exclusively from us. But there were places when we wanted to sell our lubricating goods and they did not feel as though they could buy of us the lubricating goods without we would see them through safely on the gasoline proposition. 1035

Q. Is it your experience or not that there is a ready market for lubricating products with retailers of gasoline who are under lease contracts with your competitors? A. My experience is that it is not the case.

Mr. Zechiel: That is all.

CROSS-EXAMINATION by Mr. Speer:

Q. You say you have a number of stations from Buffalo to Albany. What kind of stations are those? A. They are auto stations for filling autos. We own

them and pay the operator a salary, and he gives us daily reports of his operations.

Q. The operator is in reality your agent? A. Absolutely.

Q. Either on a commission or salary basis? A. Yes, one or the other; generally salary.

Q. How many of those stations have you along from Buffalo to Albany? A. Oh, we have some twenty.

Q. Are they expensive stations? A. Well, they have been profitable to us.

1037 Q. You own the property, I presume, the buildings? A. We either own the ground and the outfit, or the ground is leased and we own the outfit in every case.

Q. In a general way what do those stations cost you? I don't want to go into your busines particularly, but in a general way what do they cost? A. You mean the maintenance per month?

Q. No; I mean the first cost of the equipment, the fitting them up, putting in pumps, building the building, buying the property? A. From $500 to $1,500.

Q. Do you fit them up with pumping equipment? A. Yes.

Q. That itself would cost more than $500, would it

1038 not? A. Yes.

Q. Then you cannot have any station that cost only $500, can you? A. I think we have some places where they own the tanks themselves.

Q. Oh, the operator owns the tank? A. Yes; there may be some such cases.

Q. But still you have made him your agent, and he is operating and selling your gasoline? A. Yes.

Q. Do you sell your gasoline under a trade brand? A. Well, we try to.

Q. Well, you do? You use the name of some kind, do you not? A. Yes.

Q. Do you advertise it? A. Yes.

Q. And you so advertise at those stations of yours? A. Yes, sir.

Q. Take these main lines of travel, like from Buffalo to Albany, during the touring season a great many automobiles come along, do they not? A. Yes, sir.

Q. And is not a great part of the trade in gasoline, selling it to these automobiles that are touring the country? A. Yes, a great part of it is.

Q. As a matter of fact your business has increased of late years? A. Yes. 1040

Q. You speak of some of the retailers in connection with lubricating oil, that they were anxious to get some one to supply them with gasoline. As a matter of fact during war times, gasoline was a little scarce, was it not, and a retailer was glad to have some arrangement by which he could be insured of a supply? A. Yes, sir.

Mr. Speer: That is all.

By Mr. Schekter:

Q. Mr. Matthews, you say you are familiar with the practice of the oil companies to make arrangements for the leasing or loaning of this pumping equipment 1041 for a nominal consideration. Now, as a matter of fact have you ever asked to see the agreements under which the arrangement is actually made? A. Personally I never have, but my representatives, agents have.

Q. But I am confining my question to you personally, Mr. Matthews. You have never seen the agreements under which these arrangements have been consummated? A. I never have, no, sir.

Q. And you are testifying entirely from what other persons have told you, so far as you testify about what arrangement has been made? A. I am testifying what the men state that made the arrangements.

1042 *C. B. Mathews, Cross*

Q. That was from what other persons have told you and not from your inspection of the agreements? A. That is true.

Mr. Schekter: I move to strike out from the testimony of this witness all he has said about what he learned from the statements of other.

Examiner McCorkle: Note the objection.

By Mr. Schekter:

Q. Now, Mr. Matthews, you testified further that the dealers wanted to deal with somebody who would
1043 not neglect them when they had him tied. Just what do you mean by that statement? A. I mean that they failed to supply him when they were supplying their own stations.

Q. But what do you mean by the statement that they have him tied? A. That he had that contract with them, or agreement—I don't know that it was a written agreement, or simply an oral agreement—I don't know as to that.

Q. Don't you know that they have a perfect right under the agreement that they make with the oil company to install any other equipment and put in gasoline or other products of any other company from
1044 whom they may see fit?

Mr. Zechiel: The Commission objects, on the theory that the attorney for the Atlantic Refining Company is correct, that this gentleman does not know anything about those contracts, and therefore cannot answer the question.

Mr. Schekter: Therefore do I understand that the attorney for the Federal Trade Commission—

Examiner McCorkle: Argument off the record, Mr. Reporter.

(Argument off the record.)

Mr. Schekter: I press my question.

Mr. Zechiel: Oh, I don't object to it.

Examiner McCorkle: Read the question.

(The question was read, by the stenographer, as follows):

"Q. Don't you know that they have a perfect right under the agreement they make with the oil company to install any other equipment and put in gasoline or other products of any other company from whom they may see fit?" A. Personally I don't know but what they have that right. I only know what they do, what they say. 1046

By Mr. Schekter:

Q. As a matter of fact, irrespective of any tying clause or tying agreement, is it not true that a retail dealer who sells to consumers would have absolutely no right to sell through the pump of the Standard Oil Company of New York gasoline of any other refinery?

Mr. Zechiel: To which the Commission objects, as a conclusion of law. The witness is not at all qualified to answer. 1047

Mr. Schekter: If the Examiner please, this is as material a statement of fact as I can conceive pertinent to this issue.

Examiner McCorkle: What is the question?

(The pending question was repeated by the stenographer, as above recorded.)

Examiner McCorkle: That is a question that the witness cannot be expected to answer because he has said he had not seen any agreement.

Mr. Schekter: I mean now, irrespective of any agreement. My question is premised on that.

Examiner McCorkle: That is a matter of law, and the witness will not be required to answer that question.

By Mr. Schekter

Q. Mr. Matthews, if the Standard Oil Company of New York, or any other oil company, installs a pump and storage tank, a measuring device to Mr.
1049 John Jones, and labels the pump with its name, so that persons who seek to buy the product of the Standard of New York may know they are getting it, would you, or such retail dealer, attempt to sell to any purchaser the product of any other oil company through that pump? A. I would if the man operating the pump asked me to, I would sell him; but the trouble is he don't ask me (laughter).

Q. I am assuming you are the man operating the pump. You are referring now to the oil company. When you say the man operating the pump, to whom do you refer? A. I am referring to the man at the station. That is the agent, so to speak, of the party
1050 installing the pump.

Q. I am assuming, Matthews, in the illustration I am giving you, that you are the retail dealer, and a purchaser asks you for the product of the Standard Oil Company of New York, and you have on your premises a pumping equipment bearing the label of the Standard Oil Company of New York: would you, or is it your experience, that any other retail dealer does sell to such purchaser a product other than the product of the Standard of New York? A. I don't know that the question has ever been asked me.

Q. Now will you consider that it is asked you, and answer it in the light of your experience? A. If a responsible party wanted to buy gasoline of me I would sell it to him as a matter of principle and public policy.

Q. You would then undertake to sell him the product of the Warren Oil Company as the product of the Standard Oil Company of New York? A. I would not.

Q. No? A. I consider our product superior (laughter).

Q. Mr. Matthews, to be perfectly serious now, and 1052
to get a proper answer on the record, I want your statement as to whether a retail dealer will sell a purchaser the product of another oil company through a pump labeled as the product of the Atlantic Refining Company, we will say, and holding out to the public that any gasoline coming through that pump is the product of the Atlantic Refining Company?

Mr. Burdeau: I object to that as involving a subject not in issue.

Examiner McCorkle: The objection is sustained.

Mr. Schekter: I assume I may have an exception? 1053

Examiner McCorkle: Yes, note an exception.

By Mr. Schekter

Q. Irrespective of any tying agreements of any nature whatever, Mr. Matthews, is it your experience that a retail dealer will continue his business with a single oil company with whom he has established relations irrespective of any tying agreement so long as the arrangement continues satisfactory and the man's

credit continues good? That question is not too involved, is it? A. I don't quite understand.

Examiner McCorkle: Read it over.

(The pending question was repeated by the stenographer as above recorded.)

A. I still fail to grasp the idea there.

Q. Let me state it more concisely.

Examiner McCorkle: Explain it to him without putting it on the record.

1055 (Explanation off the record.)

A. I should think he would stick by the company with which he had the contract, if they supplied him properly, and if they did not I think he would buy the best he could and take the consequences.

Q. And if they did not then he would do what has been done in your experience, drop the oil company even though there was a tying agreement, and buy of you? A. Yes, sir.

Mr. Schekter: That is all.

By Mr. Speer:

1056 Q. Is it not a fact there are more companies operating in your territory now than there were a few years ago? A. Yes, sir; in a large way.

Q. So that competition has increased of late years? A. Yes, sir.

Q. Don't you think this method, this system, of leasing and loaning pumps has had something to do with increasing the number of companies that are operating? A. I hardly think so. The increase I consider—that is, in the quantity of gasoline sold—due to the desire of the big companies to cover the whole field. Those that were only operating locally and those that were only operating in other things

have pushed into gasoline and got next to the consumer.

Q. The big companies are trying to reach the consumer? A. That is it.

Q. And they do it by this method? A. The biggest ones that I know own the equipment, and they use this loaning business to hitch in fellows that they could not get otherwise.

Mr. Speer: That is all.

RE-DIRECT EXAMINATION by Mr. Zechiel: 1058

Q. I want to ask you, Mr. Matthews, just one question. Referring to the statement you made on cross-examination, in answer to a question by counsel for the Atlantic Refining Company, with respect to the readiness of retailers of gasoline, who are buying from a company, to jump from one company to another, do I understand it to be your position that a retailer of gasoline would as readily jump from one company to another if he were under no contract for the lease or loan of a pump, as if he were under such a contract of lease and loan? A. I think he would more readily do it if he was under no contract.

1059

By Mr. Schekter

Q. Why would that be, Mr. Matthews? Why do you say that? A. I say that because he is free-handed to buy where he chooses.

Q. Is not he under the lease and loan agreement? A. No, sir; he is not.

Q. Have you seen the agreement?

Mr. Zechiel: I object to that question.

Mr. Hayes: It is perfectly proper there.

Mr. Zechiel: He has been over the whole thing.

Mr. Schekter: It is directly in answer to the statement to you.

Examiner McCorkle: The witness has said that he has not seen any contract, and you are attempting to examine him about something he has never seen.

Mr. Schekter: I desire this taken in support of my question. The witness has stated on re-direct examination—

Mr. Zechiel: Mr. Examiner, can't we proceed?

Mr. Schekter: The witness has stated on re-direct examination that the retail dealer does not jump as readily when there is a contract of lease and loan as when there is not, and his reason for that is because he is not able to jump when he has a lease and loan agreement. Now in order to rebut that statement I want to show either that there is no such provision in the lease and loan agreement, if the witness knows, or if he does not know, that ought to appear of record, so as to attack the correctness and accuracy of his statement on re-direct examination.

Examiner McCorkle: The witness answered the question on the assumption that those agreements were tying contracts, but he said he did not know anything about it.

Mr. Schekter: I will phrase my question this way.

By Mr. Schekter:

Q. Mr. Matthews, if as a matter of fact there is nothing in the agreement which ties the man down so as to prevent him contracting elsewhere, the reason which you have given fails, does it not?

1063

Mr. Zechiel: To which the Commission objects, because there is no evidence, and never will be any evidence in this case, that that is the fact about these contracts. These contracts are made a part of the Atlantic Refining Company's answer, and the contracts themselves, in the answer filed in this case, will not support that question.

Mr. Speer: On cross-examination you have a right to ask anything you please.

Mr. Zechiel: I do not see any reason to go outside of the facts of the case.

1064

The Witness: I would say further, if you will permit me.

Mr. Schekter: I don't want any further statement. I want an answer to my question, unless it is ruled out.

Examiner McCorkle: Go ahead and answer.

The Witness: The jumping depends very largely on the man's ability to take care of himself, when he gets acquainted with the business. If he has not any ability to obtain tanks and other things, he probably will hang on where he is.

1065

By Mr. Schekter:

Q. And that is true whether there is a tying agreement or not? I say, that is true either way? A. I don't think so.

Q. Then, again, I want your reason. A. I think a man who enters into a contract generally enters into it from good motives and personal interest, and if he finds that in operating it is not to his personal interest, he will get away from the contract in one way or another.

Mr. Schekter: Why, of course. That is all.
Mr. Zechiel: That is all.
(Witness excused.)

P. C. HUBBARD, was called as a witness, and being first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. What is your address? A. Bradford, Pennsyl-
1067 vania.

Q. With what company are you associated? A. The Kendall Refining Company.

Q. What is your relation with that company? A. Secretary and treasurer.

Q. How long have you been associated with that company? A. Between ten and eleven years.

Q. Have you had a general experience in the gasoline and oil business prior to that time? A. No.

Q. Since you have been with that company in what capacity or capacities have you been employed? A. More particularly with the sales and finances.

Q. Have you ever had occasion to travel about over
1068 the territory, over which you sell your product? A. Yes.

Q. Has that been a common experience of yours? A. Yes.

Q. What is the general geographical territory in which your company does business? A. We do a large barrel trade out of Bradford, in practically all of New York State, a portion of Pennsylvania, and we have a large distributing system in Hartford, Connecticut—but we only handle lubricating oils down there. We have a tank truck of gasoline and kerosene at Bradford, Pennsylvania, and we have that service at Buffalo, Dunkirk and Lockport, New York.

Q. Out of Bradford your business is wholly within the State of Pennsylvania? A. No, we distribute direct from Pennsylvania in barrels and drums.

Q. No. In your Bradford territory you say you distribute in tank wagons around Bradford? A. Yes.

Q. And all that distribution is within the State of Pennsylvania? A. Absolutely.

Q. In connection with your business in the sale and distribution of gasoline and other refined oil products, do you also handle pumps and tanks? A. We do.

Q. Do you sell such equipments? A. Very rarely.

Q. Do you lease or loan such equipments? A. We 1070
loan them.

Q. What are the conditions under which you are engaged in that kind of business? A. That the customer handle Kendall gasoline in that pump and tank.

Q. How long have you been engaged in the pump business in any capacity? A. Approximately three years.

Q. And during that time you have both sold, and leased and loaned? A. We have sold in this sense, that if a dealer wanted Kendall gasoline we would buy the pump for him, giving him the benefit of the refiner's price. The pump companies usually allow the refiners about 20 per cent discount, and we would 1071
buy it. We would not make a profit on the equipment.

Q. But you did that sort of business, you say? A. Well, we have sold them for possibly five years but we have not leased equipments for over three years

Q. You never sold your equipments for a reasonable profit on the transaction? A. No.

Q. Always at cost? A. Yes.

Q. What was the occasion of your entering onto the leasing and loaning practice in your business? A. We are engaged in the oil business in Buffalo, and

it was a case of either doing that or losing the business.

Q. Will you explain more completely what you mean? A. A customer handling Kendall gasoline would come to us and say, "Now, here, the Standard (or one of the others; I am referring to the Standard of New York) they have agreed to put me in an equipment. If you want to follow suit we prefer your product. Should you do the same we will continue, but if not you need not come around any more." We stood pat for a while, until we saw it
1073 was too costly, we were losing too much business.

Q. By "standing pat" you mean what? A. We refused to put in equipment, but we found that was too costly, since we were losing business, and we followed suit and installed equipment to retain business, to retain our established business.

Q. To what extent have you lost the business because of that system of lease and loan? A. Not to a very great extent. We would always weigh the facts in each case, and if a customer's business was small we would not go to the expense of putting in the equipment, but we would let one of our competitors have that business.

1074 Q. Do you also deal in lubricants? A. Yes.

Q. Have you ever lost any lubricant business because of this lease and loan arrangement practiced by competitors? A. I don't think so.

Q. In your territory do garage people and other retailers of gasoline generally have more than one installation of such equipment? A. Just one.

Q. Would you say it is rare or otherwise that they have more than one? A. Real large dispensers of gasoline generally have more than one.

Q. Where they have more than one, are such equipments under lease or loan agreements? A. Mostly lease and loan.

1075

Q. Where they are under lease and loan, are they leases and loans from different companies or from the same company? A. Ordinarily from the same company.

Q. Would you say then it is a rare occasion in your experience in your territory for one retailer of gasoline to have installed at the same time such equipments and sell to them the gasoline of different oil companies at the same time? A. It is the exception.

Q. Who are your competitors? A. Principally the Standard Oil Company of New York, Sinclair, Elmer E. Harris, Peas Oil Company, Upson & Ster- 1076
ling—that is in New York. In Bradford, Pennsylvania, the only competitor is the Atlantic Refining Company.

Q. So far as you know do all of these competitors practice this same form, this lease agreement? A. Yes.

Mr. Schekter: At this point, Mr. Examiner, I will ask to again press my objection. If the witness has not seen the agreements, I do not think he is qualified to answer the question.

Examiner McCorkle: Note the objection; the witness may proceed.

1077

Mr. Schekter: May I ask whether the witness has seen the contracts, a preliminary to the objection?

Mr. Zechiel: Go as far as you like.

Examiner McCorkle: When counsel gets through, you can bring it out.

By Mr. Zechiel:

Q. Answer the question. A. What is the question?

(The pending question was read by the stenographer, as above recorded.)

1078 *P. C. Hubbard, Direct*

A. Yes.

Q. From your experience, Mr. Hubbard, in the conduct of your business in your territory, do you think that the leasing or loaning of oil tanks and pumps for a nominal consideration, under the agreement or understanding that the lessee thereof, or the party receiving the equipment, shall not use, through such equipment, the products of any other company than that installing the equipment or leasing the equipment, is a sound business practice?

1079 Mr. Speer: The question is objected to as incompetent, immaterial and irrelevant.

Examiner McCorkle: Note the objection. The witness may proceed.

A. I think it is a vicious practice.

By Mr. Zechiel:

Q. Why do you make the answer as you do? A. May I answer that by giving an illustration?

Q. I should think so, Mr. Examiner.

Examiner McCorkle: Proceed.

The Witness: There is a garage about 3,000 feet, I should say, of the refinery—this is at Bradford. We
1080 do not retail gasoline from the refinery; we are not equipped to and do not care to do it. This garage is a new building, a new place. They came to us and said they wanted to handle Kendall stuff. We were only too pleased to have them do so. They had a small equipment of their own. They put it up to us that if they were going to continue to handle Kendall gasoline that we would have to put in a pump, which we did. The Atlantic Refining Company had a pump, I would say, not over 200 feet from this location. Our pump was in this place I should say less than a month before the Atlantic had one plastered in alongside of it.

Now, that is not sound business, in my estimation. The Atlantic have a pump in one of the largest garages in Bradford, and the owner has been to us repeatedly asking for one of our equipment. Well, we won't put it in.

Mr. Zechiel: That is all.

CROSS-EXAMINATION by Mr. Speer:

Q. The effect of the case which you have mentioned, Mr. Hubbard, is to make competition right in that garage between your gasoline and the gasoline 1082
of the Atlantic Refining Company, so that the automobile man can take which he chooses; that is the effect of it. A. The effect is that he can take whichever gasoline he wishes.

Q. And if you would put yours in uptown where the Atlantic has one, and where they are asking you to put one in, it would make competition in that garage between you and the Atlantic people, would it not? A. It would.

Q. But you refuse to go in and compete? A. We refuse because there would not be enough business left over. This garage uptown has two pumps, and his business would not warrant a third one. 1083

Q. That is your opinion? A. That is just my personal opinion. And this other garage I cited is a comparatively small garage. That is why I say the practice is vicious.

Q. Don't you think, Mr. Hubbard, that there is too much competition and too much fighting for business? A. No.

Q. You concede that is a good thing? A. Oh, yes, I believe in it absolutely.

Q. Is it not a fact that the competition in your territory is increasing of late years? A. Yes, sir.

Q. There are more companies engaged in the business? A. Yes, sir.

Q. Don't you believe that this system of leasing and loaning pumps is enabling companies to come in and get a foothold which otherwise they would not be able to do? A. I would say it was a good lazy man's way of getting business, yes.

Q. It is good business? A. We have gotten the business without doing it.

Q. Well, you have a particularly good grade of gasoline in your local territory where it is well known.
1085 If you can get it to the public as yours they will buy it, will they not? A. You bet.

Q. Now a new man comes in and wants to build up a business. He has got to get his product to the public under some name in order to get the business. Is that a fact? A. Surely.

Q. And is not this the easiest way he can get to the public and the cheapest way, so as to sell his product under his name? A. I would say the easiest but not the least expensive.

Q. What would be a less expensive method? A. He would have to sell in equality. That would be quite a salesmanship proposition.

1086 Q. I am asking what method. You say this is not the least expensive. A. The practice that we followed in establishing our trade in Buffalo was to go to the garages, and we said, "Here, it is true the Standard will put in equipments, these other fellows, but our stuff is straight Pennsylvania gasoline and the quality would warrant you handling our stuff—the demand after it is once established. I would like to fill up your tank once or twice, or even fill your car (if it happened to be a leased place) and let you try the gasoline yourself. After you try it I think you will be willing to handle Kendall gasoline." I

don't know how a person would start with an inferior product without making some attempt to offer it either in price or elaborate equipment.

Q. If he did that and used a name and sold an inferior article the public would soon quit buying it, would they not? A. If they followed it up with elaborate advertising, not necessarily so.

Q. You think that a man that has a trade brand under which he is selling to the public will help his business by selling an inferior article under that name, and thus cause it to have a bad reputation? A. If he has not got any other article to sell what is he 1088
going to do.

Q. If it is a bad article and it becomes known under that name you are getting an inferior gasoline, the name is not going to help the sale of it much, is it? A. If it becomes well known?

Q. Yes. A. Of course if it is known an article is inferior that is no boost to it, but by clever advertising you may be able to put it over.

Q. You may be able to get a man to buy it once. A. Oh, no; we have not got all the business in Buffalo.

Q. Do you make the only good gasoline that is on the market? A. No, I don't think so. 1089

Mr. Speer: That is all.

By Mr. Nesbitt:

Q. Mr. Hubbard, in this garage that you are referring to, in Warren or Bradford— A. Bradford.

Q. Where you refused to make an installation, if you had thought it a profitable investment you would have made the installation, would you not? A. Oh, we aim—

Q. Just yes or no. A. If it was profitable, you say?

Q. If you thought it was a profitable proposition you would have made the installation, would you not? A. Well, I cannot say that we would.

Q. Why would you not? You would or would not have made it. A. I will say no.

Q. Why not? A. Because Kendall gasoline—we advertise that these different garages are handling Kendall gasoline. It is possible that the garage might use the Atlantic's, or some competitor's. We like a person to go to a garage up there and get Kendall gasoline.

1091 Q. Then you would not have thought it a profitable business proposition to make the installation; otherwise you would make it. Is not that the real answer? A. No, not necessarily.

Q. As a business proposition your company does not want to sell in a garage where there is another gasoline being sold; that is true, is it not? A. That is true.

Q. And you do not regard it as profitable business to make an installation of your gasoline in a garage where there is an installation for another gasoline? A. Oh, no.

Q. No? A. Not necessarily at all.

Q. I am not clear yet, Mr. Hubbard, as to why
1092 you would not make that installation in the garage in Bradford if you had thought it a profitable investment to do it. A. As I say, we advertise the Kendall gasoline can be obtained at certain garages and we do not care about the garage handling some other make of gasoline. If they want to handle Atlantic, let them handle it.

Q. But it was not a profitable business proposition for you to make that installation; is not that true? That is, you regarded it as such? A. In this first case, yes. I am referring to the small garage where there are two installations.

Q. In other words, you want to be in the garage, to have your installation in the garage, and your gasoline to be used in a garage, where no other gasoline is being handled. That is what you prefer? A. Yes.

Q. And you are advertising that garage as having your gasoline and no other person's gasoline? A. Oh, no, we do not advertise that.

Q. You do not advertise your gasoline at all? A. We advertise our gasoline as being sold at the following garages.

Q. And you try in every way to identify your name 1094
with your product, don't you? A. Yes.

Q. And bring it in as close connection with the product as you can? A. Yes. If a person wants Kendall gasoline we want them to get Kendall gasoline.

Q. What do you mean when you say you think this practice of loan and lease agreement at a nominal rental is a vicious practice? What do you mean by vicious? A. Wasteful. Here is the Atlantic with an installation 200 feet away. We put in a pump equipment which is ample to take care of this business, and the Atlantic comes along and puts in a second pump. It is a close proposition whether it would be profitable 1095
even with one pump. If I had known that second pump was going in I never would have gone in with the first one.

Q. If you had a grocery store on one corner and I opened one on the other corner, would that be a vicious practice? A. If you owned both pumps.

Q. If you owned one on one corner and I opened a grocery store on the other, would that be a vicious practice? A. In a sense, yes. By making the dealer buy his own equipment he is going to be satisfied with

his equipment, is going to be before he puts it in. In this way he does not have to use any judgment. You come along and say, "I want to put in equipment. Kendall has one across the street and I want to put in one here." It does not cost him anything, and the tendency is for him to tell you to go to it.

Q. That is all.

RE-DIRECT EXAMINATION by Mr. Zechiel:

Q. Mr. Hubbard, your company would not refuse
1097 to sell gasoline to a man who had installed his own equipment even if he had two or three equipments and was using one kind of gasoline in one and one in another? A. Absolutely not.

Q. You sell to anybody you can sell to? A. Yes.

Q. Your only objection is to installing equipments where other people have installations? A. Yes, sir.

Q. And you do not ever do that, do you, if you can avoid it? A. If we can possibly avoid it we do not install equipments.

Q. From your experience is that the general practice of your competitors, that they do not install where you or some one else has an installation? A. The
1098 vast majority of our equipments are installed in Buffalo, and there is an ordinance there now that will permit only so many equipments in one block, so that covers that.

Q. Speaking of the Atlantic Refining territory—A. There is no restriction in Bradford.

Q. What is the fact there, whether or not the installations are duplicated by the same companies? A. There are only two companies there that follow that practice. That is the Atlantic and Kendall, and we only have, I think, about two equipments there.

Q. So that duplication is a rare thing? A. Yes.

Q. And in fact is not the very purpose of these contracts to control the business of the company, the retailer, with whom you put in your leased equipment, to such an extent that if you did not think you could control his business by placing such an equipment under such a contract, you would not place the equipment at all? A. Yes.

Mr. Zechiel: That is all.

RE-CROSS EXAMINATION by Mr. Schekter:

Q. Mr. Hubbard, if the Atlantic Refining Company wanted the patrons of the particular garage where you had installed your equipment to have an opportunity of purchasing its product right there at the garage, the only effective and economic way by which that could be done was by installing equipment there, was it not? A. Yes.

Q. And it had to do that by putting in equipment under its own trade name so that its product could be served through that equipment? A. Yes. My objection is planting them so close together.

Mr. Schekter: That is all.

(Witness excused.)

GEORGE N. ROOS was called as a witness, and being first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. Your name is what? A. George N. Roos.

Q. And your address? A. Georgetown, Pennsylvania.

Q. With what concern are you connected? A. The S. F. Bowser Company.

Q. In what business? A. Selling gasoline tanks and oil storage devices.

Q. Where are the headquarters of your company? A. Ft. Wayne, Indiana.

Q. How do you conduct your business in a general way? How do you handle your trade? A. I am a local representative for the Bowser Company. I have a certain district in which I am the sales agent.

Q. How do you conduct your own business? A. My own business?

1103 Q. Yes. A. In selling to the garages, stores and factories, as to selling tanks and pumps for the handling of oil.

Q. Do you take orders for gasoline pump equipments? A. Yes, I take orders, and those orders are shipped from the factory in Ft. Wayne, Indiana.

Q. You mean the orders are filled directly from the factory? A. Yes, and the goods are shipped from the factory.

Q. The goods are shipped from the factory at Ft. Wayne to your various customers in Pennsylvania? A. Yes.

Q. You have occasion, do you, in the course of your business to travel about over the country in which

1104 you do business, for the Bowser people? A. Yes.

Q. What, in a general way, is that geographic territory? A. My territory consists of Cambria, Blair, Center and Clearfield Counties in Pennsylvania.

Q. That is in and about what? A. That is around Johnstown, Altoona, DuBois and Bellefonte.

Q. What is your experience with respect to the distribution of oil tanks and pumps? Do garages generally in your territory have under installation more than one such equipment? A. In a very small percentage of the cases they have two pumps; mostly only one.

Q. Are you acquainted with the method of doing business of the oil companies with respect to pumps in that territory? A. Yes.

Q. What is their method? A. In my own territory there is only one large refining company that operates; that is the Atlantic Refining Company. That company is the only company that to my knowledge installs the equipment for customers.

Q. What equipment is installed by that company? A. The Gilbert & Barker equipment, made in Massachusetts.

1106

Q. Do you know of your own personal knowledge how such installations are made in your territory, what agreements or understandings are made in connection with the installation? A. Only by verbal information.

Q. And where did you receive this information? A. From prospective customers.

Q. What is the occasion under which you get such information? A. One special case, S. F. Crilly, in Altoona, wanted an installation—

Mr. Schekter: No, that is not the question, Mr. Witness. Will you repeat the question, Mr. Stenographer?

1107

(The pending question was repeated by the stenographer, as above recorded.)

By Mr. Zechiel:

Q. Under what circumstances generally do you get your information along that line? A. Directly from the customer.

Q. And what are the circumstances? A. Personal talk with the customer.

Q. Concerning what? A. Concerning equipment, concerning the buying and selling to him of the equipment.

1108 *George N. Roos, Direct*

Q. Do you recollect particular cases of this sort? A. Yes.

Q. You may state them.

Mr. Schekter: Objected to insofar as they are stated as information derived—

Mr. Zechiel: Wait until we get to it.

Examiner McCorkle: Go ahead and let the witness proceed.

The Witness: I called on Mr. Crilly in Altoona relative to pumps and tanks. He had purchased tanks
1109 and I wanted to sell him pumps. He says, "No, Mr. Roos, I cannot give you an order for pumps because the Atlantic Refining Company are going to give me two pumps for nothing," and he said, "I would be a d-a-m-n f-o-o-l not to take them."

Q. Any other instances? A. Mr. Cherry, in the same town, who opened a garage in Altoona, told me that they were giving him two pumps for a very small rental. I do not recall the rental, but it was either $4 or $8 a year.

Mr. Schekter: May it be understood that I need not repeat my objection to each one of
1110 these instances?

Mr. Zechiel: You can have objections to all of them. Go ahead.

The Witness: I also want to say, in regard to the Crilly situation, that in his business the gasoline business did not appear satisfactory, and the Atlantic Refining Company took out the pumps, and in the Cherry garage they were also removed.

By Mr. Zechiel:

Q. I did not understand you. A. In the last instance, Cherry, they were also taken away, again.

Q. Do you recall any other specific instances? A. None that I have personal knowledge of.

Q. Do you know as a matter of fact whether your experience in these cases has been the general experience in the conduct of your business in your territory with respect to the installation of pumps? A. No. I only know of these two separate cases where I can state anything definite.

Mr. Zechiel: That is all.

Thereupon, at 12:30 o'clock, P. M., a recess was taken until 1:45 o'clock P. M.

After recess.

The hearing was resumed at 1:45 o'clock, P. M., pursuant to the taking of recess.

GEORGE N. ROOS resumed the stand, and having been previously sworn, testified as follows:

Cross-examination by Mr. Schekter:

Q. You say, Mr. Roos, that the Atlantic Refining Company installs Gilbert & Barker equipment exclusively? A. As far as I know.

Q. Do you know that the Atlantic Refining Company buys pumps and this equipment from the Bowser Company, too? A. No.

Q. You don't know? A. No.

Q. You don't know that that is not so? A. No.

Q. You don't know that that is not so; you simply have no knowledge on the subject? A. I have no knowledge about it.

Mr. Schekter: That is all.

(Witness excused.)

1114 GERRY W. LEWIS was called as a witness, and being first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. Your name is what? A. Gerry W. Lewis.

Q. What is your address? A. Washington, D. C., 206 Evans Building.

Q. With what concern are you associated? A. S. F. Bowser & Company.

Q. What is your position with that company? A. I am a local salesman. That is, I sell exclusively in
1115 certain territory.

Q. What is your territory? A. I have seven counties in Maryland.

Q. What is the general product that your company handles? A. Gasoline and oil storage equipment.

Q. You say you are exclusively in the District of Columbia? A. No, sir; I have several counties in Maryland. This is where I make my headquarters.

Q. You do no business at all within the District? A. No, sir.

Q. What portion of Maryland generally? A. I have Prince George, Charles, St. Marys, Calvert, Montgomery, Anne Arundel and Howard.

1116 Q. They are near what? A. They are south of here and just north of the city; east, south and north of the City of Washington.

Q. Oh, yes. How long have you been with your concern? A. In this position I have been with them since the first of this year. I have been with the firm, though, on two occasions, once in 1912, then in 1918 and 1919. In this territory I have been in this work just this year.

Q. You heard Mr. Roos testify this morning, did you? A. Yes, sir.

Q. So far as the general method of doing business, both yours and on behalf of your company, do you conduct your business similar to the way in which Mr. Roos conducts his business? A. Yes, sir.

Q. In connection with your business you have occasion to travel about over your whole territory, do you? A. Yes, sir.

Q. Who are the customers generally to whom you sell your equipment? A. Garages, general stores, different kinds of stores; any one who may be interested, whom I think I can interest.

Q. General retailers of gasoline? A. Yes, sir.

Q. What is your experience over your territory? Do retailers of gasoline generally have more than one such equipment installed in the same place? A. Not generally.

Q. Where there are two or more of such equipments installed, are they equipments through which such retailers sell more than one kind of gasoline at the same time? A. I don't know of a single case in my territory where that is true. I know of several cases where they have two pumps, but I think they use the same gasoline in both pumps.

Q. Are you acquainted with the system which is practiced by some of the oil companies of leasing and loaning equipment to retailers of gasoline? A. Yes, sir.

Q. Have you in your experience lost customers or prospective customers because of this system of leasing and loaning pumps? A. Yes, sir.

Q. Describe more in detail your experience in that respect? A. Of course it will not be possible for me to give every instance but there have been a number of cases where these men have told me that they would have purchased had it not been for the fact that they were going to be given an outfit.

1120 *Gerry W. Lewis, Direct*

Mr. Schekter: That is taken subject to our objection, I take it, as hearsay evidence.

The Witness: I have in mind several cases where that occurred.

By Mr. Zechiel:

Q. Under what circumstances were those conversations had? A. It was always at the time I went to see them to try to sell them equipment.

Q. That they made these statements to you? A. Yes, sir.

1121 Q. Has that been a frequent experience in your business, or not? A. That is comparative, of course, but I would say it was frequent. There have been quite a number of outfits put in my territory on a lease or loan arrangement.

Q. Would you say that that has been a more frequent experience say in the last six months than prior to that time? A. I should say it has been equally frequent all during the year I have been on this territory. I do not think it has been any more frequent in the last part of the year than the early part.

Q. What makes of pumps are installed in your
1122 territory under lease and loan agreements, if you know? A. The Gilbert & Barker, I believe the American, and I think in some cases the Pennsylvania, and in some cases the Bowser.

Q. Do you know what oil companies install these various makes? A. I know who installs the Gilbert & Barker, the Standard Oil Company. The American pump is installed by the American Oil Company. Now, I want to be accurate; I am not certain that the American pumps are put in on a lease agreement. I seem to remember that I was told that they were, by one of the men I approached, but my recollection is not very

clear about that. I don't know who puts in the Pennsylvania. In that case, too, I must specify that I don't believe any of those pumps have been put in since I have been on the territory, but I do r call two instances that I was told they had been put in or loaned, but by whom I have forgotten. The Bowser has been put in by the Gulf and Texas.

Q. If you know, about what per cent of the installations in your territory have been placed under l·ase and loan agreements? A. You mean other than the ones I saw?

Q. No, I mean of the total installations? A. I 1124
don't quite understand your question. You mean of all pumps that go in my territory, whether they are sold by me or by competitors?

Q. Yes. I will have the question read to you, and you can see if it is not clear.

(The stenographer read as follows):

"Q. If you know, about what per cent of the installations in your territory have been placed under lease and loan agreements?"

Q. The installations? A. I am afraid I could not estimate that. I would not like to venture—of course 1125
I know it is not fifty per cent; it is less than that, but how much I don't know.

Q. You mean that less than fifty per cent have been installed under lease and loan agreements? A. As nearly as I can come to it I should say so, yes, sir.

Q. In these instances to which you have testified where you visited various retailers of gasoline for the purpose of selling them equipment and you were informed that such equipment would be furnished by oil companies, do you know whether or not in those in-

1126 *Gerry W. Lewis, Cross*

stances such equipments were furnished? A. I know of some cases that they were, yes, sir.

Q. Do you know who furnished them in those cases? A. Yes, sir.

Q. You may state it? A. A case in Rockville, W. C. Bean opened a garage. I sold him his lubricating equipment, tanks for lubricating oil, and he told me then that he was going to give me an order for a five gallon stroke pump, if he was not able to get one from the Standard Oil Company, but he thought they were going to give him one, and they did.

1127 Q. Without going into detail at the present time as to just who they were, if you can, state in a general way in your answer to my question without specifically enumerating the various places, who furnished the equipment? A. The Standard Oil Company, the Gulf Company and the Texas Company.

Mr. Zechiel: That is all.

CROSS-EXAMINATION by Mr. Speer:

Q. Do you sell your pumps and equipment to the oil company? A. No, sir.

1128 Q. You would not sell one of them to an oil company that wished to lease and loan? A. I would sell them to an oil company if I could.

Q. Do you sell to the retailer for sale again? A. No, sir.

Q. A sales agent, such as you are, is expected to sell only to the man who is going to use the pump himself? A. Yes, sir, or sell to the consumer.

Q. You do not sell to a retailer? A. To a jobber, no, sir.

Q. You do not on that account make any effort to sell to the oil companies in large quantities? A. No, sir, I do not.

Q. Some of the companies that are competing in your territory do use your pumps? A. Yes, sir.

Q. Under these lease and loan agreements? A. Yes, sir.

Q. What companies use your pumps? A. The Gulf and the Texas.

Q. They have been competing in your territory of recent years? A. Yes, in the northern part of my territory they are in active competition.

Q. And they are installing quite a few pumps, are they not? A. Not very many. I believe there are only three cases in my territory.

Q. The pumps that they do install, are your pumps? A. Yes, sir.

Q. And that is the way they are doing business, is it not, by leasing and loaning equipment? A. You mean that is the way the Texas and the Gulf Companies are doing business?

Q. Yes. A. Well, they do business that way and they do business without leasing and loaning pumps.

Q. These pumps of your company which they lease and loan they buy direct from your company, not through you? A. I have never had an order pass through me, no, sir.

Q. They buy them, as you understand, direct from the company? A. From the company. From what office, I don't know.

Q. Probably at wholesale rates. A. I don't know just exactly the arrangements with the oil companies.

Q. Well, they do not buy them through you, anyhow? A. No, sir.

Q. So far as they buy pumps from your company and install them that gives your company the business, although you don't get it? A. Yes, that gives us the business.

Mr. Speer: That is all.

Mr. Zechiel: That is all as far as I am concerned.

(Witness excused.)

J. S. WALSH was called as a witness, and being first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

133 Q. What is your name? A. J. S. Walsh.

Q. And your address? A. Parkersburg, West Virginia.

Q. With what concern are you associated? A. S. F. Bowser & Company.

Q. Where is the territory over which you engage in business? A. In Charl ston, West Virginia, and the surrounding territories, including Parkersburg, West Virginia.

Q. You heard Mr. Roos testify this morning, did you, Mr. Walsh? A. Yes, sir.

Q. Do you conduct your business for yourself and your company substantially as he testified to this morn-
134 ing? A. Yes, sir.

Q. In connection with that business you have occasion to travel about over the territory and come in contact with retailers of gasoline, do you? A. Yes, sir.

Q. What is your experience in your territory? Do retailers of gasoline generally have installed mor than one such equipment? A. Generally speaking it is really a one-pump proposition. There are instances, of course, where there are two or more, but generally speaking, one.

Q. In these instances where there are two or more, are such installations used in connection with the sale and distribution of more than one make of gasoline? A. Not to my knowledge. It is usually either the same or of the same quality, except one is what they call high or low grade of gas.

Q. But furnished by the same oil company? A. So far as I know it would be supplied from the same source.

Q. Who are the oil companies who are engaged in business in the territory in which you work? A. We have the Standard Oil Company of New Jersey, 1136
as I understand it, the Indian Refining Company; I think the National does some business in our section, in some lines.

Q. The National Petroleum Company? A. The National Refining Company.

Q. Refining company? A. Yes, sir. Those are the principal sources of supply. Then there is the Elk Refining Company, which is a local company, along with a number of other small local companies that supply locally.

Q. Are you acquainted with the general practice of leasing and loaning such equipments to the garage trade and other retailers? A. To the same extent as 1137
has been stated before; we have the same thing in our territory to contend with as I hear of in other territories. Pumps are installed as I understand it under an agreement of that kind.

Q. Have you ever lost any customers or prospective customers because of this practice? A. I have to the extent of being promised absolutely the purchase of our equipment at practically a fixed date, at which time I would be advised that they were sorry they could not give me the business, from the fact that they were

1138 *J. S. Walsh, Cross*

going to be furnished the equipment without any cost whatever.

Q. And their conversations in that respect were had at the time you were attempting to negotiate your sale? A. Yes, sir, in a number of instances.

Q. Would you say you had lost a considerable or a small amount of business by that practice? A. In a way I would consider it considerable. It would be with me at least in my volume of business.

Q. What pumps have been installed under lease and loan agreement? A. So far as I know there is none
1139 installed other than that of the Standard Oil Company.

Q. And that is what make of pump? A. G. & B.—Gilbert & Barker.

Mr. Zechiel: That is all.

CROSS-EXAMINATION by Mr. Speer:

Q. Do not any of the other companies that you have mentioned, the Elk Company, or any of the others, lease and loan pumps? A. Not to my knowledge, no, sir.

1140 Q. They may be doing it, however? A. If they are I have never heard of it.

Q. What other pumps are in use there? A. In my territory you have reference to?

Q. Yes. A. There are such a variety of them it would take quite a number to mention all. But the principal pumps are the Bowser pump, Gilbert & Barker, the Milwauka.

Q. Your business generally has been increasing in the last two or three years? A. Yes, sir, my business has increased some.

Q. You don't sell pumps to dealers for resale? A. No, sir, not with that understanding.

Q. You say that so far as you know garages with more than one pump never handle but one make of gasoline. There may be cases in your district where it is otherwise? A. I have reference to that question in this way: In a few instances they have put in two pumps to accommodate the demand for the service, or speed, in which cases the gas would probably be the same quality. In another instance or two they are using what we call a high pressure and a regular refined or standard grade of gas.

Q. There may be cases where they have different gasoline, a different make of gasoline, served from 1142
these different pumps? There may be such cases in your district? A. You mean from different refineries?

Q. Yes. A. It is possible, but not to my knowledge, though.

Q. Does the Atlantic Refining Company sell its gasoline in your district under a trade name or brand? A. Not that I know of.

Q. Don't they use any trade-mark? A. The Atlantic Refining Company so far as I know are not doing any business in my immediate territory.

Q. Oh. It is the Standard of New Jersey. I beg your pardon. A. As far as I know.

Q. Do they sell gasoline under a trade-mark or 1143
brand? A. The Standard Company?

Q. Yes. A. The trade-mark that I see on the pumps installed seems to be "Standard Gasoline." There is a sign to that effect.

Q. That is the name they use, the New Jersey Company? A. Yes, sir, as I understand it.

Q. Does the Elk Refining Company use a name for its gasoline? A. Not that I know of.

Q. You don't know of any other company then that has a name under which it sells its gasoline? A. The National Refining Company's gasoline is sold un-

1144 *J. S. Walsh, Cross*

der the name of "White Rose," but I don't see it used very extensively.

Q. Do they have their signs up where they have filling stations? A. The signs I have seen are seemingly what you would call a metal sign, punched.

Q. It is not over the pump? A. It is not on the pump, but attached to it by a metal sign.

Q. But you do see garages at different places with a sign some place about the garage, to indicate they are selling that kind of gasoline? A. Occasionally, yes, sir.

1145 Q. Is it not a fact that you know of garages in the same locality, say in the same block or in the same neighborhood, where one is selling the Standard gasoline and the other is selling the National gasoline? A. Well, I can't recall any particular instance where installations of that class are made. In fact there is very little gasoline sold in my territory that is advertised, than the Standard. They are the principal source of supply of gas in that territory.

Q. The Gulf and those that have been mentioned here are not operating in your territory? A. Not operating, no.

Q. That is all.

1146 By Mr. Schekter:

Q. You do know that the oil companies are selling and leasing this equipment only as an incident to the sale and distribution of their petroleum products? A. I know only to the extent that the equipments are in use, and the knowledge given to me by the users that the pumps are furnished them free by the Standard Oil Company.

Mr. Schekter: In so far as the witness has testified not of his own knowledge, I move that his testimony be stricken out.

Examiner McCorkle: The motion is overruled.

By Mr. Schekter:

Q. Now, I will ask you the question again, and ask for a responsive answer: You do know that the oil companies are selling and leasing this equipment only as an incident in the sale and distribution of their petroleum products, and that they are not engaging in the sale of equipment generally? A. So far as my knowledge of the plan is, the Standard Oil Company sells and loans both. They seem to sell where convenient, and in many instances in the case of competition it has been a matter of decision over weeks of duration, on which the final decision would be that they secured the business, to my knowledge, as an answer to me, simply because the equipment would be furnished to them without cost, not as a matter of choice, quality or service, but without cost.

Q. Again I ask you whether such business which the oil company does is incidental to this petroleum business?

Mr. Zechiel: I think the question has been answered. There is no use of answering it again.

Mr. Schekter: I think not.

Mr. Zechiel: I insist on my objection.

Examiner McCorkle: I do not know whether it was answered but it was asked once before.

Mr. Schekter: Yes, I have asked it three times before and have not yet got an answer.

By Examiner McCorkle:

Q. Have you answered the question? A. I have answered it as I understood it.

1150 *J. S. Walsh, Cross*

Mr. Schekter: Let us see if we understand each other.

Examiner McCorkle: Repeat the question, Mr. Stenographer.

(The stenographer read as follows): "Q. Now, I will ask you the question again, and ask for a responsive answer: You do know that the oil companies are selling and leasing this equipment only as an incident in the sale and distribution of their petroleum products and that they are not engaging in the sale of
1151 equipment generally?"

Examiner McCorkle: Read the answer.

(The answer to the question just repeated, was read by the stenographer, as recorded.)

Examiner McCorkle: That looks like an answer.

The Witness: I made it broad.

Mr. Schekter: I ask that the answer to my question be stricken out as not responsive to the question.

Examiner McCorkle: Leave it in.

Mr. Schekter: There was a question after
1152 that; what was it?

(The stenographer read as follows): "Q. Again I ask you whether such business which the oil company does is incidental to its petroleum business?"

The Witness: I consider I have answered it, although I can give it the same consideration.

Examiner McCorkle: I think that has been answered. Is there anything further?

Mr. Schekter: Nothing further.

(Witness excused.)

R. R. FAIRCLOTH, was called as a witness, and being first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. Your name is what? A. R. R. Faircloth.

Q. What is your address? A. Clinton, North Carolina.

Q. With what concern are you associated? A. S. F. Bowser & Company.

Q. What is the territory generally over which you do business? A. Charlotte, North Carolina, and surrounding territory. 1154

Q. You have heard Mr. Roos, Mr. Walsh and Mr. Lewis testify, have you not? A. Yes, sir.

Q. Do you conduct your business substantially as they have testified they have conducted their business? A. Practically the same; yes, sir.

Q. And is your experience in the conduct of your business substantially the same as theirs, to which they have testified? A. Practically so; yes, sir.

Mr. Zechiel: That is all.

CROSS-EXAMINATION by Mr. Speer:

Q. What companies operate in your territory? A. 1155 You mean the oil companies?

Q. Yes. A. There is the Standard Oil of New Jersey, Gulf Refining, Texas, The National Oil Company and a very few independent oil companies.

Q. Does the Texas Company install pumps on the leasing and loaning system? A. Yes, sir.

Q. And the Gulf Company also install them on the lease and loan system? A. Yes, sir.

Q. Do they install the Bowser pump when they loan them in that way? A. They use the Bowser and Wayne.

1156

Q. The Texas uses the Bowser mostly, do they not? A. Yes, sir.

Q. They buy those pumps direct from your company, and not through you? A. Direct; yes, sir.

Mr. Speer: That is all.

(Witness excused.)

G. A. SMITH, was called as a witness, and being
1157 first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. State your name and address? A. G. A. Smith; Shenandoah Apartments, Richmond, Virginia.

Q. With what concern are you connected? A. S. F. Bowser & Company.

Q. What has been your experience with that company? A. You mean the duration?

Q. Yes. A. Except for three or four summers during which I attended college, since 1911.

Q. How long have you been in your present territory? A. Since December, 1918.

1158 Q. What is your territory? A. Richmond City and nearby counties of the state.

Q. You heard Mr. Lewis, Mr. Roos and Mr. Walsh testify? A. I did not hear all of Mr. Roos' testimony; I heard the rest.

Q. Who are the oil companies who are engaged in business in your territory? A. The Texas Company, the Standard of New Jersey, the Richmond Oil Company, the National Oil Company, and, I think, the Gulf Refining Company has just begun to operate there.

Q. With respect to the general practices and experiences in your territory, and with respect to the

leasing and loaning of oil pump equipments, has your experience been substantially the same as that of the three witnesses to whose testimony I have directed you? A. I think it has. I do not have present in my mind just now all of the various questions that were asked, but generally and substantially I think it has been the same.

Mr. Zechiel: That is all.

CROSS-EXAMINATION by Mr. Speer:

1160

Q. Has not this leasing and loaning system, Mr. Smith, caused more pumping equipment to be installed in your district than in all probability would have been installed if the system was not in vogue? A. Yes, I believe so.

Q. In fact, it has increased largely the installation of pumps? A. Yes, in my opinion.

Q. And in that way has enabled the pump manufacturers to sell more pumps than otherwise they would have been able to sell? A. Yes.

Q. The Texas Company leases and loans pumps under this system in your district? A. Yes.

1161

Q. Whose pump do they install when they make such leasing and loaning arrangements? A. Principally the Bowser pump, but others, too.

Q. Those pumps they buy direct from the manufacturing company, from your manufacturing company, and not through you? A. Yes.

Q. Do any of the other companies install oil pumps? How about the Gulf Company? A. As I say the Gulf Company has just begun to operate there.

Q. It is just beginning to operate? A. Yes, just beginning to operate, and I don't believe they have installed any since I have been on the territory.

1162 Q. In what territory were you a salesman prior to coming to this territory? A. At different times as to different territories. I was in West Virginia for a while and western Maryland and in northern Virginia, the Shenandoah Valley, and also in North Carolina for a while.

Mr. Speer: That is all.

RE-DIRECT EXAMINATION by Mr. Zechiel:

1163 Q. Just one question: In connection with the number of installations you testified that because of the leasing and loaning of oil tanks and pumps you believed there had been more installations than there would have been if there had been no leasing and loaning, and all installations had been through sales. Am I correct about that? A. Yes.

Q. Why do you think that is true?

Mr. Speer: I imagine, Mr. Examiner, that is a question of fact. He believes it is true because he has seen—

Mr. Zechiel: I would rather have the witness state it.

1164 Examiner McCorkle: In one case he gave an opinion, and in Mr. Zechiel's case he wants the reason for the opinion. Strictly, I think both of them are incompetent. Note the objection. You can go ahead and give your reason.

The Witness: I agree with the testimony submitted yesterday by Witness Willock. I think men with insufficient capital are induced to go into the business, and by insufficient capital I mean men that would probably not equip themselves with that style of outfit, as extensive equipment as they have to put in.

By Mr. Zechiel:

Q. And the reason you give now for believing there would not have been as many, is the same reason that Mr. Willock testified to yesterday; is that true? A. As I repeated it just now, that is my belief.

Mr. Zechiel: That is all.

(Witness excused.)

GEORGE J. MOHR, was called as a witness, and 1166
being first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. State your name and address. A. George J. Mohr; Freedom, Pennsylvania.

Q. You are connected with what concern? A. With the Freedom Oil Works Company.

Q. What is the general line of business of that company? A. Refined petroleum products.

Q. What is the general geographical territory over which you do business, Mr. Mohr? A. Pennsylvania, Ohio and West Virginia.

Q. You do business generally in the sale of gaso- 1167
line in these various states? A. Yes, sir.

Q. In that connection you transport your product back and forth between those states in the transactions? A. Yes, sir.

Q. Do you in connection with your business deal in oil tanks and pumps? A. Yes, sir.

Q. Do you sell such equipment? A. We do.

Q. And lease and loan? A. No, sir; we do not.

Q. Do you place any of those equipments with your customers under any sort of an agency contract? A. No, sir.

1168 *George J. Mohr, Direct*

Q. You handle them only through sale? A. Only through sale; yes, sir.

Q. How long have you been handling pumps and tanks in that way? A. I would say eight to ten years.

Q. In a general way to whom do you sell such equipments? A. Garages, filling stations, and an occasional store that wishes to handle gasoline in that way—that is a hardware store as a general thing.

Q. Do you sell such equipments to retailers who handle large gallonages as well as small gallonages? A. Yes, sir.

1169 Q. You make no restriction of any kind either by contract or agreement as to the use of such equipment by the purchasers thereof? A. No, after it has been paid for.

Q. Who are competitors in your territory? A. Principally the Atlantic Refining Company, the Gulf, the Texas—the Texas only partly, one or two sections—and the Pittsburgh concerns, Waverly, Transcontinental, the Liberty Oil, A. D. Miller & Sons, and maybe a few others.

Q. Do you sell in West Virginia, you say? A. Yes, sir.

Q. Who are your competitors down there? A. The
1170 Standard Oil Company of New Jersey, I believe—they can reach to points in West Virginia; the Fairmont and the Wheeling.

Q. Are you acquainted with the practice of some of your competitors of leasing and loaning such equipments to retailers of gasoline? A. Yes, sir.

Q. Have you ever lost any business because of that practice? A. We have.

Q. What were the facts in that respect? A. In one particular town there was a customer of ours for twelve or sixteen months, he had a small outfit, and his business was increasing. He says, "Now, I

need a larger outfit. The Atlantic Refining Company offered to put the outfit in free of cost."

Mr. Schekter: That is objected to as hearsay, not of the witness's own knowledge, and I, therefore, move to strike it out.

Examiner: McCorkle: Note the objection. Let the witness proceed.

The Witness: "If you people will do the same we will give you the business, as we prefer to handle your goods."

By Mr. Zechiel: 1172

Q. They told you that at the time you were attempting the sale of your goods? A. Yes, sir.

Mr. Schekter: At what time?

The Witness: At the time they were going to make the change, if we did not put it in.

By Mr. Zechiel:

Q. What other experience? A. We have another in what we call our Newcastle district, the very same —"We will give you the preference if you will give us the outfit."

Q. The same kind of experience? A. Yes, the 1173 same kind of experience.

Q. Was that experience common in the conduct of your business? A. Well, partly. In the case of any others they were starting in business, and gave us the opportunity if we would furnish the outfit to get the preference.

Q. Did you furnish the outfit? A. We did not.

Q. Did you sell such concerns? A. Very seldom. We tried hard but very seldom were able to do it.

Q. Do you know who did sell them? A. In most instances the Atlantic and the Gulf.

1174 *George J. Mohr, Direct*

Q. Do you know whether the Atlantic installed equipments in those cases under the lease agreements? A. The Atlantic sign was on the pump later.

Q. You had no conversation with the retailer in regard to that at the time? A. Not personally; only from our salesmen out on the road. Shall I go on?

Q. Yes, go ahead. A. One particular customer, I know positively, has the Atlantic outfit in, handling Atlantic gasoline, and would handle Freedom if it had not been for being given an outfit free of cost.

Q. How do you know that to be true? A. I saw
1175 the contract. He told our salesman that Freedom would get the business if we would furnish the outfit.

Q. Have you any other cases of that sort? A. Yes, I could mention two or three others where they gave us the first opportunity, but we not being willing to furnish the outfit the Atlantic Refining Company are now supplying the gasoline.

Q. Do you know about what per cent of the equipments in your territory are installed under lease and loan agreements? A. I could not say positively, but they have been quite numerous lately.

Q. From your experience would you be willing to
1176 make a fair estimate as to the approximate number or per cent of that sort of business? A. I am afraid I could not do that, no.

Q. In your experience do garages and other retailers in your competitive area have installed more than one equipment of the sort? A. Only the larger, or it depends a great deal on the location of the garage or filling station. There are occasionally some of course that have two or more pumps, but in the majority of cases one.

Q. In those cases where there are two or more, what is the fact, if you know, as to whether those

pumps have been installed under lease and loan agreements, or have been bought outright? A. Some have been bought outright; others have been installed free of cost.

Q. Where they have been installed free of cost, if you know, state whether or not the gasoline sold from those pumps was the gasoline of two different companies or of the same company? A. Most the same company. Occasionally other companies put gasoline in. It depends. If their stock happens to be low and another oil company comes along, sometimes they will buy it, but they are not considered regular customers. 1178

Q. That is the exception to the general practice? A. That is the exception; yes, sir.

Q. From your experience in the conduct of your business, is this business practice of leasing or loaning oil tank and pump equipments for a nominal consideration, under agreements or understandings that the lessee or the party using the pump shall not use in connection with the same the products of any other company than that furnishing the equipment, a sound business practice?

Mr. Speer: The question is objected to as incompetent, immaterial and irrelevant.

Examiner McCorkle: Note the objection. 1179

The Witness: We do not consider it good business.

Mr. Zechiel: That is all.

CROSS-EXAMINATION by Mr. Speer:

Q. You say your company deals in these tanks and pumps, or sells them to the users. You do that merely as an incident to your oil business, as I understand it? A. Yes, sir.

1180 *George J. Mohr, Cross*

Q. Do you sell them to the users at cost to you? A. No, sir; we figure on making a profit.

Q. A reasonable profit? A. Yes, sir.

Q. The Texas and Gulf Companies have begun to operate in your territory in rather recent years, have they not? A. Yes, sir.

Q. How long since the Texas began to operate there? A. I would say possibly two years.

Q. And how long since the Gulf began to operate? A. I would not say positively; I would say possibly four or five years.

1181 Q. So that there is more competition in your territory now between oil companies than there was a few years ago? A. Yes, sir.

Q. A few years ago the Atlantic Company as a matter of fact had a monopoly of the business, did it, a practical monopoly? A. Practically. I would not—

Q. And it then had adopted the practice of selling its product to the consumer under its trade name or brand? A. Yes, sir.

Q. It established agencies, selling stations, where it sold its product through these pumping equipments to the automobile people and other users of gasoline? A. I understand it did; yes, sir.

1182 Q. And then subsequently it adopted the loaning system instead of the agency system? A. Yes, sir.

Q. And it was doing that in sections where there was no competition against it, just as much as in sections where there was competition? A. There is competition practically everywhere in Pennsylvania and Ohio.

Q. Now? A. Now; yes, sir.

Q. But how long since the Atlantic Company began selling its product to the public in that way through agencies and through these pumping outfits? A. I have been connected with the station depart-

ment or distributing branches between four and five years, and they have been doing it in that time.

Q. They were doing it before you began? A. Probably so.

Q. There were many places at that time in your territory where they had practically no competition; they had a monopoly? A. Yes, the Atlantic Refining Company in some localities had a monopoly.

Q. And they were establishing the agencies and leasing and loaning pumps in those sections just the same as they were in sections where there was more active competition? A. Leasing and loaning them? 1184
I don't know about that. They have been doing that more recently.

Q. And the competition has been coming in, too, more recently? A. Oh, yes.

Q. And all of the companies that are coming in and trying to get the business, try to get it in that way, do they not, by establishing these pumping outfits where their oil is sold under their trade-mark or brand? A. Yes, most all of them.

Q. Then the result of this system you think has been to increase the number of these pumping outfits that have been used in your district? A. It naturally would increase them. 1185

Q. Is there any locality in your district now where the Atlantic Refining Company has no competition? A. No, I could not say positively as to there being any in my locality, no; it is pretty well filled up.

Mr. Speer: That is all.

By Mr. Schekter:

Q. When you make your sales of equipments what arrangements do you make with your customers for payment? A. We endeavor to get cash payment.

1186 *George J. Mohr, Cross*

Q. But where you do not? A. We get a cash down payment and the balance so much per month until all has been paid for.

Q. What provision do you make for reservation of title in yourself until the payments have been completed? A. We have the contract signed by them that they agree to complete the payments.

Q. And pending that payment the title is reserved in your name? A. Naturally it would be.

Q. During the period pending the payment of all installments, what restriction do you have as to the
1187 use of the equipment? A. Our contracts read that we expect them to use Freedom gasoline, but it does not stipulate all Freedom gasoline.

Q. Have you seen the lease agreement used by the Atlantic Refining Company? A. I have.

Q. Do you know that that agreement does not require them to use all the gasoline of the Atlantic Refining Company? A. Not all the gasoline of the Atlantic Refining Company, but only their gasoline.

Q. And you mean to say that the lease agreement of the Atlantic Refining Company provides they may not buy the gasoline of any other oil company?

1188 Mr. Zechiel: I think that contract will speak for itself.

Mr. Schekter: The witness has testified to what the contract contains.

Mr. Burdeau: He has no right to testify to his knowledge of a written instrument.

Mr. Schekter: I am testing the credibility of this witness, and I think I should be allowed the utmost latitude in doing so.

Examiner McCorkle: Why a question about the contract when you have the contract there?

Mr. Schekter: We will let the witness see the contract.

Mr. Burdeau: I object to his being shown the contract for that purpose.

Mr. Schekter: I press the question.

Examiner McCorkle: The witness may answer the question.

The Witness: The contract, if I remember rightly, and I believe I do, reads to use only Atlantic gasoline in that outfit.

Q. In that outfit? A. In their outfit.

Q. It does not so far as you remember require that they may not— 1190

Mr. Zechiel: He has answered that.

Examiner McCorkle: Yes; I will rule out any further questions along that line.

Mr. Zechiel: Nobody claims that; not even the Commission has claimed that.

By Mr. Schekter:

Q. Now, Mr. Mohr, I want the name of each one of the persons whom you say have ceased dealing with your company as a result of the unfair competition of the Atlantic Refining Company? A. I could not give you each one; I could give you some.

Q. Give me those you recollect. A. H. H. Cable. 1191

Q. Address? A. Rochester, Pennsylvania, and Beaver, Pennsylvania.

Q. Yes. A. The Wampum Store Company, Wampum, Pennsylvania. The Wampum Garage at Wampum, Pennsylvania. Those three I am positive had been using our goods and are not now. As to those I refer to that gave us the preference and later did not give us the business on account of the Atlantic giving them outfits, there is David Mitchell, of Monaca, Pennsylvania. There have been others reported by different salesmen, but their names I don't recall.

1192 *George J. Mohr, Cross*

Q. Of what did that unfair competition consist in the case of H. H. Cable, of Rochester, Pennsylvania?

Mr. Zechiel: There has been no question about unfair competition, and you are asking this witness about a legal matter. He does not know about that sort of thing and has not testified along that line. He gave nothing but the facts in his direct-examination. I think the question is not a proper one.

Mr. Schekter: The question is withdrawn.

1193 By Mr. Schekter:

Q. Mr. Mohr, what are the facts constituting the unfair practice or unfair competition of the Atlantic Refining Company in the case of H. H. Cable? A. Well, in plain words, as we referred to it, the other people were buying his business.

Q. What were the facts, please? A. As I said before, we had been supplying him oil and gasoline. He had a small outfit, a filling outfit and he wanted a larger outfit. He asked us if we would supply it free of cost. We told him no, we did not do that. He said, "Well, the Atlantic Refining Company offered to do it if I will only use their goods." We
1194 tried to talk him out of it, tried to show him—

Q. Mr. Mohr, so that there may be no misunderstanding, I am asking you to testify here as of your own knowledge, what you know personally, and not what others have told you.

The Witness: I know them personally.

Mr. Burdeau: I resent that interruption. I think he is stating what is absolutely responsive to your question. It may not suit counsel very well.

1195

Examiner McCorkle: I hold that it is responsive to the question.

Mr. Schekter: I want it clearly understood that I do not want any answer except of the witness's own knowledge, and I think I am in my rights in asking for it.

Examiner McCorkle: The witness will be allowed to testify to what any of these people told him in regard to the leasing of these pumps.

Mr. Schekter: Subject to my objection?

Examiner McCorkle: Yes.

1196

The Witness: May I state why I put it this way?

Examiner McCorkle: Just answer his question.

The Witness: All right. Where was I?

(The stenographer read the concluding part of the last previous answer, as follows): "We tried to talk him out of it; tried to show him"—

The Witness: We tried to show him it would be to his advantage to own his own outfit and buy what he pleased and when he pleased—in other words not to be tied up to any one company.

By Mr. Schekter:

1197

Q. And what the Atlantic Refining Company did was to make an arrangement with him whereby they furnished him his equipment for the sale of their product under their trade-mark or brand? A. That is true.

Q. And what is true in that case is true with the other persons you have mentioned? A. Yes, sir.

Mr. Schekter: That is all.

1198 *George J. Mohr, Cross*

By Mr. Hayes:

Q. Mr. Mohr, at what price do you sell this pump equipment? A. We sell it at the factory retail price list.

Q. That is what? I don't know what price that is? A. We get any pump they want, but there is one pump we recommend.

Q. What pump is that? A. If they ask our opinion—that is the guarantee visible outfit. That pump costs—

1199 Q. Complete and installed in place? A. We do not install them. We sell the pump and tank to the prospective customer and he installs them.

Q. How much? A. The pump price list in $400. The tank depends on the size of the tank.

Q. You divide that into how many monthly payments? A. We generally get $100 cash down, sometimes $50 and $20 a month. If they are able to pay for it in two months' time we are better pleased.

Q. How long has the longest period run? A. Occasionally a man will fall down in his payments—

Q. I don't mean that. What is your general length of your contract for the payment of the outfit? A.

1200 At that rate, at $20 a month, it will run possibly fourteen to eighteen months.

Q. Fourteen to eighteen months? A. Yes.

Q. You have been in business about ten years? A. Have we?

Q. Yes. A. The Freedom has been in business since 1879.

Q. And you have been with it for ten years, as I understood? A. Well, I have been in this department between four and five years; I have been with the company for thirty years.

Q. Has each succeeding year's business been better than the preceding year's business? A. It has.

Mr. Hayes: That is all.

The Witness: Could I add more to it?

Examiner McCorkle: You need not add anything unless requested by counsel.

By Mr. Speer:

Q. On the outfit you sell on time you do not charge him interest? A. No, sir.

Q. Do you sell under a trade name? A. Freedom gasoline.

Q. And when you sell these outfits do you have your name put over them? A. We give them a globe with our name. 1202

Q. And you expect them to keep it there? A. We prefer them to; we don't insist; we don't compel them to.

Q. Would you be satisfied to let them keep your globe there and buy gasoline from somebody else and sell it, with your globe over your outfit? A. No, we would not want them to sell somebody's else gasoline under our name.

Q. Of course not; neither does any other company that has a trade-mark or brand in which they take pride, as representing a good quality of gasoline. A. Naturally not, because we would not know what they were putting out and it might reflect on Freedom gasoline. 1203

Q. Therefore, so long as they keep your globe over your outfit, and so long as they are paying you for it, they do buy, as a rule, your gasoline? A. Well, mostly.

Q. If you found they were not buying your gasoline, and selling somebody's else through that outfit, would you make them take down your sign? A. We never did. We have gone to the people and asked why they were not using Freedom gasoline. We never compelled any one to take a sign down.

Q. You allowed them to keep your sign there and sell any kind? A. We could not stop them.

Q. You could not stop them? A. No.

Q. You were willing that some other gasoline should be sold under your brand? A. We never went into that, as to their not telling people it is not Freedom gasoline.

Q. If the sign is over the outfit and an automobile comes up to get gasoline, does not the man believe that that is the gasoline that is being sold through the outfit, when he sees the sign there? A. Yes, quite
1205 naturally, but I venture to say that the majority of people driving automobiles don't pay a whole lot of attention to whose gasoline they buy—that is, the make of gasoline.

Q. You think not? A. No, sir.

By Mr. Schekter:

Q. Do you mean to say then that a man traveling the highway would stop at one service station and buy Atlantic gasoline and proceed and the next time buy Gulf where he had the opportunity of buying Atlantic, and pay no attention to the question as to what gasoline or the quality he was getting? A. He will
1206 buy gasoline where and when he needs it regardless of whose make it is.

Q. And where he has the opportunity of purchasing the gasoline which has appealed to him, being sold under the trade name of a particular brand, you mean to say he would not exercise that choice? A. If that gasoline has appealed to him he will naturally look for it if it is nearby.

By Mr. Speer:

Q. If there was no sign up at all, is it not likely, if he knew his business, that he would inquire what

kind of gasoline he was getting before he would fill up his tank? A. Judge, if you when you are driving along and need gasoline, stop at an outfit, there are very few people ask you whose gasoline they are handling.

Q. If you are out you will take any? A. Out, or need it.

Q. Are you liable to go up to a filling station, when there are plenty of filling stations with trade-marks over them, and buy gasoline from a filling station with no sign, without making any inquiry about the quality? A. I being in the gasoline business would 1208
naturally inquire, but I know many people who do not.

Q. They probably don't know there is any difference? A. Yes, indeed; some do and some don't. I will say that the majority of automobile drivers don't know any difference.

Q. There is a difference, is there not? A. There is a difference in gasolines; yes, sir.

Mr. Speer: That is all.

RE-DIRECT EXAMINATION by Mr. Zechiel:

Q. Mr. Mohr, if you know, who first introduced the system of leasing and loaning oil tanks and pumps into 1209
your territory? A. No, I don't know positively.

(Witness excused.)

E. E. GRANT, was called as a witness, and being first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. State your name and address? A. E. E. Grant, 110 South Dearborn Street, Chicago, Ill.

Q. With what organization are you connected? A. I am secretary and treasurer of the Independent Oil Men's Association of Chicago.

Q. Who are members of your association? A. We have two classes of members, active members, those exclusively engaged in the jobbing business, and associate members who are refiners and supply men.

Q. Where territorially does your membership come from? A. All over the country.

Q. What is your position with that organization? A. Secretary and treasurer.

1211 Q. As secretary and treasurer of this organization do you have charge of the books and the minutes of the meetings? A. Yes.

Q. And other notes of acts done by your company or organization? A. Yes.

Q. I will ask you, Mr. Grant, whether or not your association took any action with respect to the general practice of oil companies over the country, known generally as the leasing and loaning of oil tanks and pumps?

Mr. Speer: I want to object to that as incompetent, immaterial and irrelevant.

Examiner McCorkle: Note the objection.

1212

By Mr. Zechiel:

Q. You may answer. A. I think we made a complaint three years ago—

Q. I am speaking now with respect to any recent acts of your association. A. The Board of Directors at a meeting in September passed resolutions unanimously—

Mr. Speer: I object to that, as to what they did, as immaterial, irrelevant and incompetent. It does seem to me, Mr. Examiner, that that

ought to be ruled out. It seems to me that no one can claim that an organization of that kind, meeting and passing resolutions is making testimony one way or the other, because their action would depend upon a great many things that may be proper and may not, and upon the influences that may have been brought to bear upon them.

Examiner McCorkle: Have you a copy of the minutes along with you?

The Witness: No, but I sent the Trade Commission a copy of the resolution as passed by the Board of Directors. 1214

Examiner McCorkle: The objection will be noted. I will let it go in and will put it up to the Commission.

Mr. Speer: In that case it appears, Mr. Examiner, that the Commission has it.

The Witness: That was in connection with the Indiana case, Judge.

Examiner McCorkle: Argument off the record, Mr. Reporter.

(Argument off the record.) 1215

Examiner McCorkle: Read the pending question.

(The stenographer read as follows): "Q. I will ask you, Mr. Grant, whether or not your association took any action with respect to the general practice of oil companies over the country, known generally as the leasing and loaning of oil tanks and pumps. * * * I am speaking now with respect to any recent acts of your association."

Examiner McCorkle: That is your question?

Mr. Zechiel: Yes, and I would like to have Mr. Grant continue with his answer.

Mr. Speer: I object to the question as immaterial, incompetent and irrelevant.

Examiner McCorkle: You may proceed.

The Witness: The Board of Directors at a meeting in September passed resolutions unanimously approving of the ruling in the Standard of Indiana case,
1217 and copies of those resolutions were sent to the chairman of the Federal Trade Commission and the American Petroleum Institute.

By Mr. Zechiel:

Q. What occasioned the action of the Board of Directors in passing this resolution?

Mr. Hayes: The objection goes to all this?

Mr. Zechiel: Yes.

The Witness: The ruling of the Commission in the Standard of Indiana case, which was promulgated on or about the first of August.

1218 By Mr. Zechiel:

Q. Were there no other matters intervening in the meantime that were taken into consideration by the Board of Directors? A. Oh, yes; the referendum which was held between the—

Q. Will you describe exactly what was done in that respect? A. There was a circular letter sent out to each active member explaining that certain companies, both standard and independents, had been in the habit of loaning or leasing for a nominal consideration curb pumps and tanks, and we asked them to reply to two or three questions in that referendum.

Q. Do you have a copy of that letter? A. Yes.

Q. I would like to have it. A. There is a copy (exhibiting the same to counsel).

Q. What was the result of this investigation or referendum? A. There were about 81 per cent who were opposed to this practice and 19 per cent in favor of the continuance of the practice.

Q. By referring to this practice, you are referring to the leasing and loaning of tanks and pumps? A. For a nominal consideration, yes.

Q. Does that include under an agreement to use in those pumps only the product of the company furnishing the pump? A. The questions did not cover that but it has always been considered that where a pump and tank were supplied for a nominal consideration the parties operating the pumps and tanks would use the gasoline supplied by the parties who held title to the equipment. 1220

Mr. Speer: We object to that.

Mr. Schekter: Can we ask that this entire line of examination be subject to our objection, as incompetent, immaterial and irrelevant?

Mr. Zechiel: All right.

By Mr. Zechiel: 1221

Q. Mr. Grant, you testified, "It has always been understood." How do you arrive at that? What are the facts upon which you make that statement? A. From contracts that I have seen. You know in various sections of the country this practice is not indulged in. For instance in the far west, or I mean to say, between the Mississippi River and the Rocky Mountains, the practice has not been general. It has been general only in the Indiana territory for about three years. So that the practice has been new so

far as the middle west is concerned, as compared with the east.

Q. When you state that it was generally understood that only gasoline of the parties furnishing the pump was to be used through the pump, and that that was included in the question of furnishing pumps at a nominal consideration, how do you come by that knowledge? A. I got that knowledge from the contracts of the Texas Company.

Q. Through any other source? A. No.

Q. I am not certain whether you had completed
1223 your statement about what was done with respect to this referendum by your Board of Directors? A. They simply passed these resolutions and then sent out a letter to the trade recommending that they cease this practice if they had been indulging in it.

Q. Do you have a copy of the resolutions with you? A. No, I have not. I did not come direct from Chicago. I asked them to send me certain papers here, and some are here and some are not, but I know that is not here.

Mr. Zechiel: I want to make that resolution a part of this record to be submitted.
1224 I understand it is with the Commission.

Mr. Speer: I object to the entire examination as incompetent, immaterial and irrelevant.

Mr. Zechiel: I will just have to take it to get that, Mr. Examiner.

Mr. Speer: You do not have to do it, Mr. Zechiel.

Examiner McCorkle: Argument off the record, Mr. Reporter.

1225

(Argument off the record.)

Mr. Zechiel: It is understood I will get the copy that was sent into the Commission and make it a part of the record. That is all.

CROSS-EXAMINATION by Mr. Speer:

Q. How many members has your Independent Oil Men's Association? A. 279.

Q. When was it established or organized? A. Twelve years ago.

Q. To how many of the members of your association was this referendum you speak of sent? A. It was sent out to all active members, 114. 1226

Q. In what business are the associate members engaged as a rule? A. The associate members are refiners and supply men.

Q. And the active members are what? A. They are strictly oil jobbers.

Q. So you did not send it out to any refiners? A. No.

Q. But your first interrogatory was whether the refiner was justified in furnishing a tank at a nominal rental, and not whether a jobber was justified in doing it? A. My answer would be the same.

Q. But that is the way your query read? A. Yes. 1227

Q. And of that 114 to whom the referendum was sent, you say 81 per cent voted against the practice? A. Yes.

Q. Out of these 114 members to whom interrogatories were sent, how many replied? A. We had as I recollect it about 79 replies, but I have not the facts here.

Q. Of those replies how many were in favor of it? A. Sixty-three were against it and the balance were in favor of it. Others did not answer at all.

1228 *E. E. Grant, Cross*

Q. Have not those who have been opposed to this practice been quite active in circulating propaganda against it? A. Yes.

Q. Those that are using it have not paid much attention to their side of the case? A. No.

Q. Is there any other organization of independent oil men in this country? A. Yes, sir.

Q. Do you know how many members they have? A. No; there are three other organizations.

Q. What are they? A. The American Independent Petroleum Association, which is an organization of
1229 jobbers similar to our own.

Q. Do you know how many members they have? A. No, I do not.

Q. More than yours? A. No, they have less, because they principally operate in the middle west. Then there is the National Petroleum Association, which is an organization of eastern refiners. Then there is the Western Petroleum Refiners Association, which is an organization of mid-continent refiners.

Q. They both have large memberships, have they not, of men engaged in the oil business? A. No.

Q. Do you know what their membership is? A.
1230 Yes.

Q. Where does your company have its headquarters? A. Chicago.

Q. Most of your members are located in the west? A. No.

Q. Where are they located? A. They are located from Boston to San Francisco and from Minneapolis to New Orleans.

Q. In what business were you engaged before you became secretary of this association? A. In the oil business.

Q. Are you engaged in it yet? A. No, sir.

Q. Where were you engaged in the oil business? A. In Chicago.

Q. In what way were you engaged in it? A. I was manager for the Riverside Oil Company there in 1911. I was then secretary of this same association for two years, 1916 and 1917. I was then connected with James B. Berry & Son, Oil City, as buyer in Tulsa, and then back to this association again. But previous to that I had had twelve to fourteen years' experience in Canada in producing, refining and marketing.

Q. Your first experience in this company was in 1232
1911? A. 1911, yes, sir.

Q. Did you continue in the business from 1911 up to 1916? A. Yes, sir.

Q. You were in the oil business? A. Yes, in the oil business.

Q. In connection with the same company, the Riverside? A. Yes, sir.

Q. How long were you with the Berry Company? A. About ten months, shortly after the close of the war.

Q. Were there any other questions put to your association in reference to this business? A. I don't know what you mean?

1233

Q. Did not you put this question to them in this same referendum: "Is the small refiner or jobber justified in arranging with the distributor on a percentage basis to operate such filling pump and tank for the purpose of distributing its particular product?" A. Yes.

Q. How did they answer that question? A. That question was so complex, it was answered in so many different ways, that the referendum was never satisfactorily determined.

Q. Well, in one way or another they were all in

favor of some such arrangement, were they not? A. Oh, no; every man had a different idea.

Q. But they all thought they had a right to make some sort of arrangement by which they could have their gasoline sold through a filling station? A. Some of them did.

Q. In connection with this referendum, is it not a fact that those who were opposed to this practice were active in trying to persuade the others to vote against it; there was quite a campaign made to that effect? A. No, there was no campaign.

1235 Q. There had been considerable agitation of the matter? A. No. The matter had laid dormant for a long time, and it was revived at a conference here on the 26th of June. Then of course the trade papers reported that conference and the results of it, and the trade was naturally aroused and interested, and prepared for the referendum.

Q. I think you stated already that those who were opposed to it were quite active in circulating propaganda and in trying to convince the trade that it was a bad practice? A. No, I did not say that.

Q. What did you say? A. I said that matter was revived on the 26th of June by a conference held in

1236 Washington.

Q. I am speaking of your testimony some time ago. A. Oh.

Q. Did you not testify in the early part of your testimony that those who were opposed to this practice were quite active in stirring up a sentiment against it? A. No, I think not.

Q. You did not say that? A. I don't think so.

Q. And that those who were using it did not pay much attention to creating a sentiment one way or the other? A. I said that, yes.

1237

Q. Then those who were opposed were quite active in trying to create a sentiment against it? A. They may have been.

Q. Mr. Grant, you did not send out any interrogatories to the public generally as to what they thought of this practice? A. No; the public were not members.

Q. They were not interested, I take it? A. Not interested, no.

Mr. Speer: That is all.

(Witness excused.)

1238

W. T. LAIRD, was called as a witness, and being first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. State your name and address? A. W. T. Laird: Oil City, Pennsylvania.

Q. With what concern are you associated? A. I am employed as a traveling salesman by S. F. Bowser & Company, of Ft. Wayne, Indiana.

Q. What is your business? A. Selling pumps, tanks, and their general line of equipment.

1239

Q. And your territory is what? A. I have four counties in the vicinity of Oil City, Pennsylvania, consisting of Crawford, Forest, Venango and Clarion.

Q. How long have you been with the Bowser Company? A. Since January, 1917.

Q. In the course of your business do you have occasion to travel about over this entire territory? A. I do.

Q. What is the fact in your territory, do garages usually have more than one installation of these pump equipments? A. As a rule it consists of one installation of a gasoline pump, with a very few exceptions. There are exceptions where they have installed an additional pump in order to handle two grades of gasoline.

Q. Are those occasions frequent, Mr. Laird, or how do you describe it? A. I know of two or more occasions at Meadville, Pennsylvania, Crawford County.

1241 Q. You do not know of more than the two occasions? A. I cannot recall at this time more than two occasions.

Q. About how many installations are there in your territory, just in a rough way? A. Of what type?

Q. Of any kind of curb pump? A. That would be rather hard, to give you an answer to that.

Q. Can you venture an approximation? A. In the four counties of all kinds of equipment?

Q. All kinds, yes. A. I am not prepared to give you a definite answer on that.

Q. No, I don't want that; just roughly, as to the number? A. It would of course run into several

1242 hundred, but as to saying even approximately I would hesitate to say.

Q. Would you venture four or five hundred? A. I would say it was fully that many, if not more.

Q. Of these installations do you know, if you have knowledge, how many of them are Gilbert & Barker installations, if any? A. The Gilbert & Barker installations are greater than those of other competitive companies, I would judge.

Q. Would you say half of them? A. I would say fully half if not more.

Q. Are you acquainted with the practice of certain oil companies of leasing and loaning such equipments

to customers? A. I could not testify as to their method of conducting business because that is something that does not concern me, and I never have asked them.

Q. If you don't know, you can just say you don't know. That is all.

Mr. Hayes: No questions.

(Witness excused.)

1244 ELMER E. HARRIS, was called as a witness, and being first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. What is your name and address? A. Elmer E. Harris; Buffalo, New York.

Q. With what concern are you connected? A. The Elmer E. Harris Company, treasurer.

Q. Is that the concern which is a respondent in the case of the Federal Trade Commission v. Elmer E. Harris? A. Yes, sir.

Q. Where are you engaged in business? A. Principally in Buffalo, Buffalo and Lockport. Lockport 1245 is in one of the adjoining counties.

Q. Your business is what? A. Jobbing, buying, compounding and selling.

Q. What? A. Oils and gasoline, all products of petroleum; pumps or anything that we can make a dollar on—sell a piano, if necessary.

Q. Do you in that business handle pumps and tanks? A. Yes, sir.

Q. How do you handle these equipments in connection with your business? A. We install pumps without any agreement wherever we think it would

1246 pay us to put them in; wherever we can put them in.

Q. You mean you sell them or install them? A. In a good many cases we sell them.

Q. Are sales made with a reasonable profit on the transaction, or cost? A. Yes, we generally try to get as much as the pump man would get himself direct, so as to protect him. We don't work for love.

Q. You don't always sell; you some times— A. In the great majority of cases we put them out for the trade.

1247 Q. What is the agreement or understanding in those cases? A. We have not anything more than it is generally understood that the man puts up a garage and telephones us. We go and look him over, and if we think he is going to be good enough to use anything we move out a tank and set it up. There is no agreement.

Q. In those cases you charge nothing? A. No, sir. When we first started we followed the example of some others and charged a dollar a year and never collected it.

Q. How many of such equipments have you installed? A. I presume something over 100, maybe

1248 120.

Q. Where do you purchase your equipments? A. We purchase mostly Wayne pumps, although if a man has a particular kind—if some pump man has gone to some prospective customer and has persuaded him that he has a pump he would like, we generally try to get the pump the customer likes. There are a good many Bowsers.

Q. Those manufacturers, are they all outside of the State of New York? A. The pump manufacturers?

Q. Yes. A. Oh, yes.

Q. When you place these pump equipments with your customers do you have the equipment sent from the factory to your customer? A. No, sir, direct to us as a general thing. I think there are only one or two exceptions that I know of where pumps may have gone direct from the factory to Lockport, which is about 27 miles from us, down about the same distance as we are from the falls. To save handling, and to hurry it, we have had one or two sent direct. Usually we carry them in stock.

Q. Those that you carry in stock you have in the same wrapping or crating, that they came in when 1250
shipped to you? A. Yes, sir.

Q. And you take them right out of your stock and install them at these various places? A. We do not very often send them out with the crating, because they take up too much room that way.

Q. You uncrate them? A. We uncrate them, as a general thing, as we send them out.

Q. Do you know, Mr. Harris, in your territory who first introduced this practice of leasing or loaning these pump equipments?

Mr. Speer: I object to that as immaterial, incompetent and irrelevant. 12..

Examiner McCorkle: Note the objection. The witness may proceed.

A. I do not think I could swear to who did it first, only I could say that we did not.

Q. That is all. A. But it came in so gradually I really don't know who was the first instigator of it.

Mr. Zechiel: That is all.

1252

CROSS-EXAMINATION by Mr. Speer:

Q. Is it not a fact that the companies began doing it in places where there really was no competition, to develop new business? In order to get the business in that community they would establish a station? A. Not so far as we are concerned. There has always been competition where we have been doing business.

Q. Everywhere you are there is competition? A. There has always been competition against us. I
1253 am not making it appear as though we were the competition. It has always been a lively place for business.

Q. You don't know how that may be as to other companies? A. What?

Q. As to other companies in your locality? A. Oh, no. I am not testifying about some other situation.

Mr. Speer: That is all.

(Witness excused.)

1254

M. A. BONNELL, was called as a witness, and being first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. State your name and address? A. M. A. Bonnell, Erie, Pennsylvania.

Q. With what concern are you connected? A. The Penn Oil Company.

Q. What is the business of that company? A. We are jobbers and retailers of lubricating oils and gasoline, and so forth.

1255

Q. What is your territory? A. The territory in gasoline is practically all of the City of Erie; on lubricating oils outside of Erie in three or four states.

Q. Throughout three or four states? A. On lubricating oils.

Q. But on your gasoline? A. Almost exclusively Erie City.

Q. In connection with your business do you handle pumps and tanks? A. Yes, sir.

Q. Do you lease or loan such equipment? A. We did lease a few two or three years ago; none since

Q. How long have you been handling them in a 1256
general way? A. Three or four years.

Q. You sell them to your customers or trade generally, do you? A. Yes, sir.

Q. In making your sales of such equipments do you aim to realize a profit on the transaction? A. Yes, sir.

Q. To whom do you sell them generally? A. To garages and stores that wish to have gasoline at the curb.

Q. You say two or three years ago you were leasing them? A. We loaned three outfits three years ago.

Q. What was the occasion of your going into the 1257
loaning or leasing? A. Our competitors were loaning pumps. These people that wanted to handle gasoline were friends of ours, and we simply offered to loan the pumps. They were all new dealers in gasoline.

Q. Who are your competitors? A. The Atlantic Refining Company, Bayerson Oil Works, the United Oil Manufacturing Company and the Warren Oil Company of Pennsylvania.

Q. Have you ever lost any business because of the practice of competitors of yours in leasing such equipments to customers? A. No, sir.

Q. You say you are not now leasing such equipments? A. No, sir, not now.

Q. Do you ever have requests from your customers? A. Very many requests.

Q. But you do not? A. We simply refuse.

Q. In making your answer when you said you never lost customers or prospective customers— A. We never lost a customer because in practically every case the pumps were given to stores that had never handled gasoline. We have lost prospective customers.

1259 Q. Referring to prospective customers, what are the facts about that? A. I can recall two or three cases within the past year where they were intending to put in pumps and had made us a proposition, wishing us to put in a pump on a lease or loan proposition, and we refused to do it. They went around to our competitors and secured the pumps. I mean so they tell us.

Q. What was the case in which they told you that? A. In one case we had practically closed the sale to a grocer of a second-hand pump outfit, and they finally said the Atlantic Refining Company had offered to give them a pump free of charge, and he

1260 naturally decided to accept the pump.

Mr. Schekter: I move that the answer be stricken out as hearsay information, pure and simple.

Examiner McCorkle: Note the objection.

By Mr. Zechiel:

Q. Were the other occasions about which you have spoken, under similar circumstances? A. Under similar circumstances.

Mr. Zechiel: That is all.

M. A. Bonnell, Cross

1261

CROSS-EXAMINATION by Mr. Speer:

Q. Do you manufacture your own gasoline? A. We do not.

Q. As a matter of fact your sales of gasoline have increased rather than diminished in the last few years? A. Yes, sir.

Mr. Speer: That is all.

By Mr. Schekter:

Q. Did you see the agreement under which the Atlantic Refining Company arranged with the person whom you have mentioned? A. No, sir. 1262

Mr. Schekter: That is all.

(Witness excused.)

Thereupon, at 4:20 o'clock P. M., the hearing was adjourned until tomorrow, Wednesday, November 26, 1919, at 9:30 o'clock A. M.

1263

1264 *Paul Himmelfarb, Direct*

Washington, D. C.,
Wednesday, November 26, 1919.

Met at 9:30 o'clock A. M., pursuant to adjournment.

Before: Examiner George McCorkle.

Appearances: As heretofore noted.

Proceedings.

1265 PAUL HIMMELFARB, was called as a witness, and having been first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. State your name and address? A. Paul Himmelfarb; Rosslyn, Virginia.

Q. With what company are you connected? A. The Penn Oil Company.

Q. Does that Penn Oil Company have any relation at all to the Penn Oil Company in the State of Pennsylvania? A. We have a branch in Philadelphia.

Q. In Philadelphia? A. Yes, sir.

1266 Q. You are not acquainted with Mr. Bonnell, of the Penn Oil Company, of Erie, Pennsylvania? A. No, sir.

Q. What is your general line of business? A. Refined oils and gasoline.

Q. Jobbing? A. In the jobbing business.

Q. Where is your territory? A. Here in the city.

Q. I mean is it all within the district here? A. No, some in Virginia.

Q. What is your territorial area generally? Where do you do business? A. That is for this district here, or all over?

Q. Wherever you do business? A. Baltimore. Baltimore is our main office; Washington and Philadelphia.

Q. Around in Baltimore what is the territory over which you do business, around Baltimore? A. It takes in about twenty miles in Maryland around Baltimore.

Q. Within a radius of twenty miles? A. Yes, sir.

Q. And at Philadelphia? A. Right in the City of Philadelphia.

Q. And here in this location? A. Washington, 1268
yes.

Q. Outside of the District any? A. In Virginia.

Q. What kind of a business do you run, and how do you conduct it? A. Mostly tank wagon business?

Q. Who are your customers? A. We have some wholesale consumers and jobbers, and also retail filling stations of our own that we operate here in the city.

Q. You mean you sell to garages and smaller places? A. Yes, sir.

Q. You also have some service stations of your own? A. Yes, sir.

Q. Are they owned by your company? A. Yes 1269
sir.

Q. How many such stations have you here in Washington? A. We have about thirty here in the city.

Q. How do you conduct your business in Baltimore? A. They have some stations, and they only sell to garages, and so forth.

Q. Retailers? A. Yes, sir.

Q. And in Philadelphia? A. The same way.

Q. In connection with your business do you ship your product back and forth from your main of-

fices out to all your distributing points? A. To the filling stations, yes.

Q. Are you engaged in handling pumps and tanks, and equipment generally, in the distribution of your products? A. Yes, sir.

Q. In that respect do you sell such equipments? A. Yes, we sell occasionally. We have not sold any for some time, though.

Q. How long have you been engaged in the selling of such equipment? A. I would say about five years.

Q. Do you lease or loan such equipments? A.
1271 We are not doing it now, no, sir.

Q. Have you done it? A. Yes, sir.

Q. During what time were you engaged in that kind of business? A. About three years ago, maybe four years ago. We have not loaned any pumps out since.

Q. At that time for how long a period had you been loaning? A. Just about a year, maybe a little over.

Q. Are those facts true also of your Baltimore and Philadelphia stations in connection with the business there? A. Yes.

Q. Who are your customers generally to whom you
1272 have sold such equipments? A. They are mostly retailers.

Q. Garages, stores and that sort? A. Yes, sir.

Q. To whom have you sold such equipments or leased it? A. About to the same class

Q. What was the occasion of your beginning the practice of leasing and loaning such equipment? Which did you do, lease or loan? A. Loan.

Q. What was the occasion of your loaning such equipments to your customers? A. At that time when we did it we were a new concern here and other people had done the same thing, and just gained customers.

Q. By other people to whom do you refer? A. Well, there are pumps here in town that have been distributed by the Standard, the Texas Oil Company, also the Columbia.

Q. And you engaged in that practice to meet the competition? A. Yes, sir.

Q. Do you know whether such equipments installed by the parties concerned, which you have named, were put in under lease or loan agreements? A. Recently?

Q. At that time? A. Certain parties, where they have loaned them? 1274

Q. Yes. Repeat the question.

(The stenographer read as follows):

"Q. Do you know whether such equipments installed by the parties concerned, which you have named, were put in under lease or loan agreements?" A. Not at this present time, I don't.

Q. I thought you testified that you installed under a loan agreement certain of these pumps because certain other parties had installed them? A. Yes, sir.

Q. Do you mean that the other parties installed such equipments under lease or loan agreements? A. 1275
Yes, sir.

Q. What was the occasion of your ceasing that practice? A. Why, when we ceased it?

Q. Yes. A. It was about three years ago when the market was out so about here that there was not anything in the merchandise, it was not a paying proposition. It did not pay to sell the merchandise, even to pumps that were owned by the other people.

Q. You mean that about that time you were not wholesaling gasoline at all? A. Well, we practically had to give up wholesaling gasoline at that time be-

cause it cost us more than what we could get for it.

Q. How long did that condition remain? A. That remained almost up until here two or three months ago.

Q. Have you now such equipments out with customers under a loan agreement? A. Not that we have put out recently. We might have a few that we put out at that time, but we have sold the best part of them, and collected them in since that time.

Q. Have you in the course of your business of gas-
1277 oline products, lost any customers, or prospective customers, because of the practice of leasing and loaning such equipments by your competitors? A. Yes. Here recently there is a concern that has been putting them out again, leasing tanks here, and recently started in again.

Q. You say you have lost customers, or prospective customers? A. Well, we have not been running after the wholesale trade here recently, because there is not anything in merchandising; there is no profit in it.

Q. You say you have lost some business because of that practice? A. Yes, sir.

1278 Q. Are those same conditions true in your Baltimore and Philadelphia districts? A. I think Philadelphia is, yes.

Q. What do you say about Baltimore? A. I could not exactly say. I have direct charge of the Philadelphia place but I don't know just exactly the conditions in Baltimore.

Q. What is your experience in your territory generally? Do garages and other retailers have installed more than one of these equipments at the same time? A. Here recently they are installing, in fact they are doing away with the old equipments and putting in

new equipments, which I understand they are not buying; they are only leasing the equipment.

Q. That is hardly an answer to my question. Read it and see, Mr. Himmelfarb, if you get it more clearly.

(The pending question was read by the stenographer as above recorded.)

A. Whether they themselves—is that what you mean?

Q. Let me amend the question. Do garages and retailers generally in your territory have more than one pump and tank outfit through which they dis- 1280
pense gasoline products? A. No, sir, just one.

Q. Do you know about how many such equipments are under lease and loan agreements, and how many are loaned outright by the retailers of gasoline? A. How many here in the district?

Q. In this territory? A. How many are owned by the garages?

Q. Yes. A. I could not exactly say how many, but there is a good number of them.

Q. Could you make any fair estimate as to the number, in per cent or proportion? A. That are owned by the garages and the supply houses?

Q. Retailers, yes, generally, and those that are 1281
leased and loaned to such parties? A. To take them in both together, or just separately? I should judge there are about 150, maybe a little over, of pumps and tanks that are owned by the individuals.

Q. And about how many leased or loaned, either one? A. Maybe there are about 50 that have been put out here recently that I think were loaned out—what I understand were loaned out here recently.

Q. When you say you understand they were loaned out, on what do you base that estimate? A. What the people tell me.

1282 *Paul Himmelfarb, Cross*

Q. You mean the retailers? A. The retailers, yes.

Q. Under what circumstances have these parties told you of this fact? A. I went down to ask for their business.

Q. And it was in connection with that they told you? A. Yes.

Mr. Schekter: May I note my objection to that?

Examiner McCorkle: Yes; note the objection.

Mr. Zechiel: That is all.

1283

CROSS-EXAMINATION by Mr. Nesbitt:

Q. What is your position with the Penn Oil Company? A. I am president now.

Q. You have a well developed trade, have you not, in this locality? A. Yes, sir.

Q. How old is your company? A. Five years here in the district.

Q. During that five years you have built up one of the best trades in gasoline in the City of Washington? A. I have built it up, but I have not got it now.

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Q. Did you have it at one time? A. Yes, sir.

Q. Your business has fallen off, then, in the District of Columbia? A. It has, yes, sir.

Q. Has it fallen off in Philadelphia? A. No.

Q. Up until the time you gave up this practice of loaning and leasing pumps, had your trade fallen off? A. Yes, sir.

Q. So that the loss in trade that you have experienced did not coincide with your giving up this practice? A. How is that, sir?

Q. Your loss in trade here in the District of Columbia did not coincide with your giving up this practice

1285

of loaning and leasing pumps; is that true? (After a pause.) Perhaps I can make it plainer. Your loss in trade was not attributed by you to your giving up this practice of loaning and leasing pumps; is that true? A. Yes, I think it is. We gave up leasing pumps.

Q. Do you attribute your falling off in trade to that fact? A. We attribute to both, that we were simply compelled to give up the trade.

Q. Then do I understand you to say that the loss in trade that you have experienced has no connection whatever with this practice of loaning and leasing 1286
pumps? A. Well, we quit leasing pumps because we were compelled to give up the trade.

Q. I see. And you did not lose the trade because you gave up the practice of loaning the pumps. It was rather the reverse? A. I can only tell you we have lost the trade on account of having a bad market here, and when we could not take care of the trade we gave up leasing pumps or loaning out pumps.

Q. And your loss in trade had something to do with your purchase of the product you were going to market, rather than your actual marketing conditions? A. I cannot say the purchases were all bad, but the market here was bad; we had a very slow market here.

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Q. You considered it unprofitable business to continue your practice of loaning and leasing pumps? A. At that time, yes, sir.

Q. When you first came in there to the District of Columbia, you found this practice of loaning and leasing pumps, which is a way of getting customers, did you not? A. Yes, sir.

Q. And that is the way that you built up your trade here? A. Oh, no; that is not the way I built up the trade.

Q. That was one feature of it? A. It might have been one feature of it.

1288 *Paul Himmelfarb, Cross*

Q. Suppose you were going into a new territory now. Do you believe that that would be a convenient way of building up your trade there? A. No, I don't think so.

Q. Why not? A. For a good many reasons, that you cannot tell whether we will always put the gasoline in the tanks. I have had many cases where other concerns were putting in gasoline in our tanks.

Q. You stopped that practice, did you not? A. I have.

Q. Would not the same practice hold good else-
1289 where that has held good here in Washington, that you could build up your trade by this practice? A. I would have to see the territory before I could say.

Q. You would judge by local conditions? A. Yes, sir.

Q. How many people were marketing gasoline here in Washington at the time you came in? A. We were the fourth. There were three, and we were the fourth.

Q. How many are there now? A. About the same, except one little concern here.

Q. You were one of the last to come in? A. No, I was not the last. Another concern came in right after.

1290 Q. You were next to the last? A. Yes.

Q. Do you feel that you have your share of the gasoline business in this locality? A. No, sir, I feel that I have not. I have had it.

Q. You feel that the loss has been due to the marketing conditions that you were speaking of a while ago? A. Yes.

Mr. Nesbitt: That is all.

By Mr. Speer:

Q. As I understand, the marketing conditions here became such that there was not sufficient profit in the handling of gasoline? A. Yes, sir.

Q. And at the time you quit loaning and leasing pumps, you also quit selling gasoline to the retail trade? A. No; we stopped leasing pumps long before we gave up the trade. We held onto some of the trade. We are holding on yet.

Q. You still did sell some, but you quit pushing the gasoline business, did you not? A. Yes.

Q. You did not care to make a specialty of it because there was not enough in it? A. In the wholesale business.

Q. And necessarily that being true you quit leasing and loaning pumps? A. Yes. 1292

Mr. Speer: That is all.

By Mr. Schekter:

Q. Is your Penn Oil Company a corporation? A. Yes, sir.

Q. Who is Mr. Willenski? A. He is not in the corporation at all. He was working for us in Philadelphia.

Q. You say you have discontinued the practice of loaning pumps during the past three years? A. Yes, sir.

Q. Do you know of an instance in which your company loaned or gave away pumps? A. Not in the 1293 District.

Q. Anywhere? A. I don't know about Philadelphia; I don't think they did. If they did I instructed them not to.

Q. You have no personal familiarity with conditions in Philadelphia? A. Well, I have, and if they have loaned any pump and tank, then it was against my instructions. I instructed them not to do it.

Q. If they had done it you would know of it, would you not? A. No. I don't think I would.

1294 *Paul Himmelfarb, Cross*

Q. Who exercises personal supervision over the Philadelphia territory? A. My brother Harry.

Q. Harry Himmelfarb? A. Yes, sir.

Q. You don't know of your transactions with the Lincoln-Way garage, in Philadelphia? A. No, I don't.

Q. There is not any question in your mind that this pump equipment, the storage tank, pump and measuring device, is practically the only safe, the most modern and efficient method of the distribution of gasoline to the ultimate consumer? A. I cannot say that. I have had many cases where you think you are

1295 putting in a pump and tank to a consumer, and in many cases you have to either ask him to return it to you or let him buy gasoline elsewhere.

Q. I am afraid you did not understand my question, Mr. Himmelfarb. I mean as to the best way of distributing gasoline. Is it not true that this pump and equipment is today the best way of doing it, the best medium for the sale and distribution of gasoline to the consumer? A. You mean to get the business now?

Q. No, irrespective of business. I am talking now about the method of distribution? A. Oh, yes; yes, indeed.

1296 Q. There is no question about that. A. Of course, he has to get a tank to put the gasoline in. That is natural.

Q. And this measuring device, pump and storage tank, is the safest way to do it? A. Yes.

Q. And the most economical way? A. That is the only way, I think.

Q. In each instance you have the trade name of the particular company on the pump as evidencing the gasoline that is being sold? A. Yes.

Q. All the companies are selling gasoline under a trade name or a particular brand—take the At-

lantic Refining Company. A. Yes, they have got their name on the pump.

Q. That is the way they assure the public they are getting the Atlantic gasoline, is it not? A. No.

Q. Why do you say that? A. Because we have put in many—as I say, it is the same thing.

Q. What were you going to say about something you had done? You have done what? A. I did not say—I might have done it, too. In some cases where the people could not get service immediately they will call up a passing-by wagon, a truck and get a little gasoline or something. Some times they have a fall- 1298
ing out with the concern about credit, or something. Then they are not waiting exactly to straighten affairs out, and they get some gasoline.

Q. Those are exceptional instances in which a person would surreptitiously sell that product to another concern as the product of the Atlantic Refining Company.

Mr. Zechiel: We object to the word "surreptitiously."

By Mr. Schekter:

Q. Was it done openly, Mr. Himmelfarb? A. That 1299
a man would buy gasoline from—

Q. Buy from another concern and deliberately sell it as the product of the Atlantic Refining Company?

Mr. Zechiel: I object to the form of the question.

The Witness: No.

Mr. Schekter: The answer is "No." I don't know whether you want to strike it out or go over it again. That is all.

1300 *Geddings Cushman, Direct*

By Mr. Speer:

Q. While you quit pushing the sale of gasoline on account of the small profit that was in it, you did continue pushing the sale of your other products you were handling? A. No, we were only pushing the retail part of it.

Q. I mean other products. You were handling other products as well as gasoline? A. We do not go much to the lubricating oil end, only to the refined.

Q. Well, you continued selling refined oil? A. Yes,
1301 retail.

Mr. Speer: That is all.
Mr. Zechiel: That is all.
(Witness excused.)

GEDDINGS CUSHMAN was called as a witness, and being first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. What is your name and address? A. Geddings Cushman; Aiken, South Carolina.

1302 Q. What is your business? A. I am an oil jobber, what you call an oil jobber. We deal in tank car lots, and buy and sell to the retail trade.

Q. You buy and sell to the retail trade? A. Yes.

Q. What is your territory? A. We have the western section of North Carolina, or South Carolina.

Q. The western portion of South Carolina? A. Yes, sir.

Q. Who are your competitors? A. The Standard Oil Company, Texas Oil Company, Gulf Refining Company.

Q. Do you know which Standard Company that is? A. The Standard of New Jersey.

Q. Do you also handle lubricants in connection with your business? A. Yes, sir.

Q. How long have you been with that company? A. For the last five years.

Q. Is the company older than that? A. That is all; we established it.

Q. Had you yourself had any experience in the oil business prior to that time? A. No.

Q. In connection with your oil business does your company engage in handling pumps and tanks used in its distribution? A. Yes, sir.

Q. Do you sell such equipment? A. I sold them 1304
for a while.

Q. While you were selling them, those that you did sell, were they sold at a reasonable margin of profit on the transaction? A. Yes, sir.

Q. Do you also or have you also, leased or loaned such equipments? A. Yes, sir.

Q. How long have you engaged in that practice? A. About the last two years or three.

Q. You are still doing it? A. Yes, still doing it.

Q. What was the occasion of your beginning the lease and loan practice? Which do you do, loan or lease? A. We loan.

Q. What was the occasion of you doing that? A. 1305
Our competitors forced us to go into that business.

Q. When you say "forced," what are the facts? A. They would take our business away if we did not do likewise. They would go to our customer and say, "If you handle our goods, or gas, we will loan you a pump and tank."

Q. If you know, what was the arrangement which your competitors entered into under these conditions? What were the facts about that? A. They would go to our customer and ask if they would not take the gasoline, and say to him, "If you will handle the gas

we will furnish you a tank absolutely free of cost to you, to sell gasoline for us at one cent a gallon profit."

Q. How did you come by this information? A. By the dealer with whom we were doing business.

Q. What was the nature of the conversations when you learned these facts? A. They came to us in an ordinary way and said, "Why, the Standard Oil Company has offered to put a tank in here and told us if we would handle their gas they would give us a tank absolutely free of charge, and we would have to pay for it only as we sold it." They also had each
1307 tank equipped with a meter and as the gas was distributed or sold out of it, out of that tank, at the end of each week they would pay for it.

Q. Was this experience a common experience in your field? A. A very common experience, yes.

Q. Would you say you had lost considerable business because of that practice? A. Yes, sir.

Q. You referred to the Standard Oil people. Are the same facts true in a general way with respect to the rest of your competitors? A. Yes, sir.

Q. What is your experience down in that territory, do the garages and retailers generally have installed more than one such equipment? A. Just one
1308 equipment, as a usual thing.

Q. What would you say about the relative number of leases and loans compared to outright ownership of such equipment? A. I believe that the lease and loan amounts to 80 or 90 per cent.

Q. And the rest are owned outright by the dealers? A. Owned outright.

Q. Do you believe that this practice of leasing and loaning oil tanks and pumps to customers at a nominal consideration, under a condition or understanding that the lessee would not use, in connection with such leased equipment, the oil products of any concern

other than that furnishing or leasing such equipment, is a sound business policy?

Mr. Speer: Objected to on the ground that it is incompetent, immaterial and irrelevant.

Examiner McCorkle: Note the objection. Let the witness proceed.

The Witness: Yes, sir, I think so.

By Mr. Zechiel:

Q. What are your reasons for that opinion? A. In the first place it has taken a tremendous investment 1310
for the small man to have to go out—

Q. Read my question again.

(The pending question was repeated by the stenographer, as above recorded.)

A. No, sir. I catch the point; I see. No, I don't think it is a good business policy.

Q. Now, my next question.

(The stenographer read as follows):

"Q. What are your reasons for that opinion?" A. Because it has taken such a tremendous investment for the small man to go out and buy this, and I believe if 1311
the man owned his own tank he would have a chance to go where he pleased. It would reduce the outlay of capital very much, and in the meantime give us a chance to fight for business on an equal basis.

Mr. Zechiel: That is all.

CROSS-EXAMINATION by Mr. Nesbitt:

Q. Your business is five years old? A. Just about, yes, sir.

Q. Is it a growing business? A. Yes, it is a growing business.

Q. If you were going into a new territory down there, expanding your business, would you feel that if you loaned and leased pumps that it would be an avenue to new business in that territory? A. That is the only way to get it now, if you go in there.

Q. Suppose you were going into a territory where another company was carrying on an established business in marketing the same product that you were seeking to market, would you believe that by loaning and leasing equipment you would have a means of entering that field in competition wth the other established
1313 business there? A. Well, yes. I think that would be a good idea. As I say, though, it is simply brought about by competitors doing the same thing. I would be forced to do that. I could not go in and ask for business because he is furnishing tanks himself.

Q. Suppose there was a company that had a service station built in a community where you wanted to go in and do business? A. Yes, sir.

Q. And they would necessarily have leased equipment there—and you wanted to enter that field. Do you believe that by loaning and leasing equipment in that field that you could enter there in competition with the established business? A. Yes, I think that would
1314 be the only way I could get in there, sir.

Q. It would require a considerable expenditure of capital on the part of your company to establish service stations? A. Yes, sir.

Q. This loaning and leasing equipment, would you consider a more economical method? A. Yes, sir.

Q. Of reaching customers? A. Yes, sir.

Q. Than by establishing service stations? A. Yes, sir.

Q. You are branching out into new territory in your section all the time, are you not? A. Yes, sir.

Mr. Nesbitt: I think that is all.

By Mr. Schekter:

Q. Mr. Cushman, what your competitors are doing is to loan this pump and equipment to the garage man or other retail dealer, through which he may sell the product of the particular competitor? A. Yes, sir.

Q. Is it your experience that the trade name or brand of the particular competitor is labeled in some way on the pump? A. Yes, sir.

Q. That in effect supersedes what was the practice some years ago of supplying the product in barrels or drums? A. Yes, sir. 1316

Q. Under the old practice the name of the company was labeled on the drums just as today it is labeled on the pump? A. Yes, sir.

Q. The Atlantic Refining Company is not a competitor of yours? A. No, sir.

Q. You don't know anything about its practice? A. No.

Mr. Schekter: That is all.

By Mr. Speer:

Q. In reference to the drums, while that practice was in force, the selling of it in drums, it was also the practice to loan those drums to the retailer, was it not? 1317

Mr. Zechiel: I want to object to the question. I do not believe Mr. Cushman's experience, as he testifies, reaches back that far. If he is able to speak from actual knowledge I have no objection to the question, but his testimony so far would not bear out that he has actual knowledge of that fact.

Examiner McCorkle: If he knows.

The Witness: I will give you the best idea about the matter that I can. Just about the time that we began business it was customary to make these shipments in drums. I admit that.

By Mr. Speer:

Q. And the retailer kept the drum until he emptied it? A. Yes, sir.

Q. Then he returned it to the seller? A. Yes, sir.

Q. And did not have to pay for any use of it? A. That is correct, sir.

1319 Q. That is all. A. Wait a minute. But they did charge 75 cents monthly rental after thirty days. Longer than thirty days they charged the purchaser 75 cents a month rental.

Q. That was largely to prevent them being kept overtime and not in use? A. Yes, I presume so.

Q. The seller was anxious to get them back? A. They wanted to keep that drum in transit within their thirty days.

Q. It was a penalty. If the man kept the drum, after he had emptied it, after thirty days, then he had to pay for keeping it lying there idle? A. Yes, sir.

By Mr. Schekter:

1320

Q. There is no question in your mind but what the pump and outfit is a far superior method of distribution than the old drum? A. Of course that is the best way. But as I said before, it required a tremendous outlay of capital for the small man to do it.

Q. At the same time you are perfectly free to compete in that way? A. I would rather not. I would rather get away from it if I could.

Q. I say, you are perfectly free to do it? A. Yes, sir.

By Mr. Speer:

Q. Suppose a man had to buy a tank wagon. That takes a good deal of money, to go into business? A. Yes, sir.

Q. This selling of oil requires considerable capital if you are going to do any business? A. Indeed it does.

Q. And if you branch out in additional business you have to get more equipment? A. Yes, sir.

Q. And that costs more money? A. Yes.

RE-DIRECT EXAMINATION by Mr. Zechiel: 1322

Q. Mr. Cushman, referring again to this hypothetical state of affairs to which Mr. Nesbitt directed your attention, where in a city community there are only service stations, and as to the method that might be used by a new company attempting to get business in that locality in competition with these service stations, what methods could be used in your experience to get into that territory? A. The only way I can suggest is soliciting business from a dealer if he has his own tank.

Q. Would such a dealer in your experience likely buy his own tank if shown the economical advantage 1323
of it? A. Yes. They do buy them in some places where they have no competition.

Q. Then leasing and loaning is not a necessary thing in order to get into that territory? A. No.

By Mr. Schekter:

Q. You do not mean that in your experience you do not find people who had locations, who were unwilling to invest in the cost of equipment to go into this business? A. Pardon me. What was your question.

1324 Q. In your experience you do not mean that you have not found persons who had located, who refused to make this investment in the cost of equipment? A. No.

Q. You have not found any such persons? A. No.

Q. In your territory? A. No.

Q. Have you at all tried to solicit the trade, or do you do that through others? A. Oh, yes.

Q. You do that personally? A. Yes.

Q. And in each case you have sold the property to
1325 him? A. No. You mean sell him the tank?

Q. Yes. A. No, I have not sold the tank.

Q. You mean he would not buy the tank? A. No, he would not buy it.

Q. And where he refused to buy it you refused to make the investment? A. Yes, sir.

Q. In that event it becomes necessary for you to adopt some alternative plan? A. Yes, sir.

Q. He might be made your agent on a commission or salary? A. Yes.

Q. You might do that? A. Yes.

Q. If your competitors did that the objection you have to the present system would prevail likewise? A.
1326 I have never had any objection other than I still go back to my same question, it takes so much money for us to handle it.

Q. That is the basic objection? A. Yes. I would rather if it could be to let that man buy his own tank and we take chances of getting his business.

Q. It is a question of whether you ought to pay for the means whereby you distribute your product, or whether he ought to pay for it? A. That is it. Naturally we try to save all we can.

1327

By Mr. Nesbitt:

Q. It is true, Mr. Cushman, is it not, that it is easier to introduce your product by approaching people in new territory with this leasing and loaning proposition? A. Oh, yes; that is a very easy way to get business. it at once appeals to prospects—when he thinks he has not got to make the investment.

Q. And when you are going into a new territory you find that a convenient and advantageous method of approach to business there, don't you? A. Yes, sir.

1328

Q. Is your investment in leased equipment out of proportion to your capital? A. No, sir.

Mr. Nesbitt: That is all.

By Mr. Zechiel:

Q. Do you also find it an economical method to get new business? A. No, I don't find it an economical method.

By Mr. Speer:

Q. Is it not more economical than if you had to go to the expense of establishing and building service stations? A. If we had to put a service station up it would probably, yes, sir.

1329

Q. That would be more expensive? A. Yes, sir. Of course, we solicit in smaller towns which do not require service stations.

Q. It would be good for you, for a little jobber, if the large companies were not allowed to put in service stations where they sell their product; you would have a better chance to get the business? A. That is probably true, yes, sir.

By Mr. Zechiel:

Q. Further about that service station, had you ever considered going into the service station business? A. Yes, sir.

Q. You have figured that over, have you? A. Yes, sir.

Q. If you were in a locality where centralized distribution were important, where you have a large gallonage that could be centralized in one location, what do you think of the economy of the service station to handle that business, as compared with the other?

1331 A. That would be economical, in that situation.

Mr. Zechiel: That is all.

(Witness excused.)

Mr. Zechiel: I think those are all the witnesses that are going to show up this morning. I want to reserve the right to introduce certain formal affairs of this sort. I think not all of the attorneys have appeared for the various respondents. I may want to show they were served with notice, and things of that sort. I am not certain whether formal evidence has been admitted in all the cases against all the respondents as to the practice itself. I think it

1332 has. But I want to reserve the right. I will not introduce any further evidence but just these formal matters.

Then we will adjourn to meet in New York, December 1st at 2 o'clock P. M., in the office of the Federal Trade Commission, at 20 West 38th Street, before an Examiner, to be designated by the Commission.

Thereupon, the further hearing in this matter was adjourned to meet in New York, Monday, December 1st, 1919, 2 o'clock P. M., in the office of the Federal Trade Commission.

New York, N. Y., Dec. 1, 1919, 1333
2 o'clock, P. M.

Before J. J. Dunham, Examiner.

Met pursuant to notice.

Appearances:

C. L. Zechiel and Joseph A. Burdeau, attorneys for the Federal Trade Commission.

Peter M. Speer, appearing for Standard Oil Company of New York.

J. H. Hayes, appearing for Standard Oil Company of New Jersey. 1334

James L. Nesbitt, appearing for the Texas Company.

Gale L. Schekter, appearing for Atlantic Refining Company.

Examiner Dunham: You may proceed, gentlemen.

Mr. Zechiel: I offer in evidence notice of taking of testimony addressed to the Maloney Oil & Manufacturing Company, Respondent in Docket No. 309, mailed to the respondent company at their offices, Scranton, Pa., by the chief counsel, Claude R. Porter, Federal Trade Commission, in conjunction with letter dated November 10, 1919, addressed to Mr. James M. Collins, General Manager, Maloney Oil & Manufacturing Company, Pa., which letter advises the respondent company of the enclosure, notice of taking testimony, and of the joining of various respondents for the purpose of taking testimony in the City of New York. 1335

The paper was thereupon received in evidence, marked Commission's Exhibit No. 2, and is forwarded herewith.

Mr. Zechiel: Mr. Examiner, Mr. Hayes wants to enter a statement of record.

Mr. Hayes: Mr. Zechiel, government counsel, has asked me to make a stipulation or admission as to the control of the Gilbert & Barker Pump Company. Testimony adduced before the Examiner connected the Standard Company of New York as being the controlling factor in the G. & B. Company. The Standard Oil Company of New Jersey owns the controlling stock in the G. & B. Company. So far as I
1337 know, the Standard Oil Company of New York has no interest in it.

Mr. Nesbitt: Is that all, Mr. Zechiel?

Mr. Zechiel: Yes.

Mr. Nesbitt: I will call Mr. Gatchell.

FREDERICK D. GATCHELL was thereupon called as a witness, having been duly sworn, testified as follows:

Direct-examination by Mr. Nesbitt:

Q. What is your business? A. Assistant manager, sales department, the Texas Company, oil busi-
1338 ness.

Q. How long have you been with the Texas Company? A. Ten years.

Q. Have you been in that capacity with them during that ten years? A. Not the entire ten years, no, sir.

Q. How many years have you served in the capacity of assistant sales manager? A. Between five and six years; six years next April.

Q. But you have been in the oil business for ten years; is that correct? A. Yes.

Q. And all of that period you have been with the Texas Company A. Yes, sir.

Q. Is the Texas Company engaged in the practice of leasing tanks and pumps at a nominal rental? A. Yes, sir.

Q. Do you know how long the Texas Company has been engaged in that practice? A. I should say four or five years; maybe three or four years—around four years I should say.

Q. In engaging in this practice of leasing equipments at a nominal rental, are the installations made within a near radius of your refined stations, or are 1340
they separated some distance from your refined stations? A. Generally speaking, within what we call a delivery radius of a certain refined station. Of course there may be another refined station located a certain distance away which might serve that pump, if necessary. Sometimes our stations are close enough together for that.

Q. Perhaps you had better tell what you mean by a refined station? A. A refined station is a station, as we term it, which is located in a city or town into which we receive the products in bulk, or in tank cars, and redistribute those products by tank wagon, tank truck or other method, to the locality being served 1341
by that refined station. It indicates the main station or the bulk station at a point. Sometimes there is more than one, in a large locality.

Q. You deliver, then, from your refined stations to these installations by truck; is that correct? A. Yes, sir.

Q. Is it true that where a number of installations of this sort are made, in a community, that the amount of storage available is increased?

1342 *Frederick D. Gatchell, Direct*

Mr. Burdeau: That is objected to, as leading and suggestive.

Mr. Nesbitt: Mr. Examiner, I quite concede that the question is leading. I also think I may say that an objection to a question as leading is a pretty weak objection to it anyway. I shall be very glad to reframe that question, however.

Mr. Burdeau: The answer will go in, anyhow, under our practice; so that it is purely a formal objection.

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The Witness: Shall I answer now?

Mr. Nesbitt: Wait until the Examiner rules.

Examiner Dunham: Gentlemen, that you may appreciate my estimate of all these matters, it is my estimate, my individual opinion, that any question asked ought to be answered, though it remotely refers to the matter in dispute, in this sort of an investigation, for the reason that, though it might not be strictly pertinent right then, before the hearings all close, some subsequent happening might bring it within the rule. So I shall rule that any

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question asked shall be answered, and the objection will be noted, so that whoever passes on it afterward may have the benefit of all the proof that is offered. So you may proceed, so far as this hearing is concerned, with that idea. At the same time, I would be glad to have both parties be as economical of time, and ask as few questions that would be objectionable, as you possibly can. I think, however, that is the safe rule in an investigation of this sort, to allow all questions asked to be answered, and

let the objection be noted. So you may answer the question.

The Witness.: What was the question?

(The reporter repeated the question as follows):

"Q. Is it true that where a number of installations of this sort are made, in a community, that the amount of storage available is increased?"

The Witness: Yes.

By Mr. Nesbitt:

Q. How do you carry, on your own books, equipments of this sort? A. We carry them as an investment item, as investments for equipment, or facilities for doing business.

Q. Do you carry them the same as you carry tank trucks? A. Yes, sir.

Q. When you lease or loan an equipment at a nominal rental, do you identify the trade name or trademark of the Texas Company with the product sold through that pump and tank? A. Always.

Q. How many installations of equipment are made under how many different arrangements by the Texas Company? This is one arrangement. What are the other arrangements under which installations are made? A. Well, we install this type of equipment in what we call our own filling stations or service stations, and this type of equipment, of course, is used quite generally in distributing gasoline to the public under all kinds of circumstances. I do not just understand what you mean by "install."

Q. You have named two arrangements under which installations are made: One lease and loan, at a nominal rental? A. Yes.

1348 *Frederick D. Gatchell, Direct*

Q. The other one a filling station? A. Yes.

Q. Are there any others? A. It may be possible that we have a very few what is known as agency arrangements, whereby we furnish the pump and tank equipments and the parties are made our agents on the commission or salary basis.

Q. Do you sell any pumps and tanks? A. We have no regular organization for selling pump and tank equipments. We have, in the past, sold a very limited number to people who might ask us to buy them for them, through contracts which we had with the pump
1349 and tank companies.

Q. Are you delivering to any people who own their own tanks? A. Yes, sir.

Examiner Dunham: I take it, Mr. Nesbitt, that you mean are they delivering oil or gasoline?

Mr. Nesbitt: Yes; gasoline.

By Mr. Nesbitt:

Q. Are those customers that own their own equipments, as a class, permanent customers? A. As a class, I would say they were.

1350 Q. Is there any greater percentage of changing, or is there any greater percentage of loss of such customers than there is among those to whom leases are made on nominal rental of these equipments? A. In my opinion, no.

Q. Out of these three arrangements under which installations of equipments are made, which is the more economical method of marketing? A. I should say the loaning at nominal rental of pump and tank equipment.

Q. During the period that you have been with the Texas Company in the position of assistant manager

of sales, has the number of competitors in your territory increased or decreased? A. Increased.

Q. In cases where you have made installations under lease at a nominal rental of tanks and pumps, have those installations been profitable or unprofitable? A. Generally profitable. I would say practically all profitable; determining the question of profitable by several different factors; that is several different factors are involved in the statement "profitable"—the amount of business done, the ability to serve the public at that point, and the advertising feature, and several considerations.

1352

Q. Do you maintain, now, under lease and loan, any installations that are unprofitable? A. Well, that is not our aim to maintain any that are unprofitable. There, again, the degree of profit comes in. One pump, of course, will produce, if you measure it in business, more profit than some other pump; but, generally speaking, we do not put in installations that are not properly termed profitable to the company. As we invest our money, we expect to get a certain amount of profit for that investment.

Q. Is it your judgment that in any of the territory under your jurisdiction there are more installations of pumps and tanks than the trade requires? A. No, sir; I should say to the contrary. 1353

Q. Is it your opinion that the practice of loaning and leasing pumps is or is not a means of bringing competition into a new territory? A. I think the practice brings in competition.

Q. From whom do you buy your equipments that you lease and loan under this practice? A. From a number of different companies.

Q. Can you name them? A. S. F. Bowser & Company; Wayne Pump & Tank Company; Rapid Day-

1354 *Frederick D. Gatchell, Direct*

ton; Guarantee Visible Measure; Tokheim. I will say, however, that the great majority of our equipments are bought from the Bowser Company.

Q. About how large an investment does the Texas Company have in these equipments that it leases and loans at a nominal rental? A. You mean per equipment, or total investment?

Q. Total. A. Well, it varies from year to year. You mean the total investment of all the pump and tank equipments that we have out?

Q. Yes. A. Well, now, I cannot give you the exact
1355 figures.

Q. I just want something approximate. I did not know whether you knew or not? A. I should say three-quarters of a million dollars to a million dollars. That includes installations and everything.

Examiner Dunham: Mr. Nesbitt, does that refer to the territory that he controls—that answer?

Mr. Nesbitt: That was what I was asking, with a view to. I was going to bring out, at the close of his testimony, just the territory that he had under jurisdiction. I did not cover it
1356 at first.

By Mr. Nesbitt:

Q. What is the cost of these installations of tanks and pumps? A. Just what do you mean?

Q. A single installation? A. The approximate average cost?

Q. Yes? A. There are two classes of pump and tank equipment generally used: The one-gallon stroke, and the five-gallon stroke pump, and there is a little difference in the cost. I would say the one-gallon stroke pump, with a ten barrel tank, the average

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would run somewhere around $250 to $300 installed, under ordinary circumstances; and the five-gallon stroke pump say from $300 to $400 installed, for the same size storage tank. That varies, however, in different localities, on account of the character of the installation.

Q. In buying these equipments, how do you handle them as regards shipment and storage and installation? A. We buy them through our regular purchasing channels, our purchasing department, and most of them are shipped in carload lots direct from the factories into our own storage in the different districts; for in- 1358
stance, at Boston, New York, Philadelphia, Norfolk, etc., and then we redistribute them from there to our customers.

Q. If this practice of leasing pumps at a nominal rental were enjoined, do you believe that the number of installations of tanks and pumps would be decreased? A. No, sir; I do not. I cannot see how they can be decreased and take care of the public demand for gasoline. Some method will have to be devised to use the pump and tank equipment.

Q. When you first engaged in the oil business, what was the facility used by oil companies for dispensing gasoline to the immediate consumer? A. Various. 1359
When I first went into the oil business, say ten years ago, the garage man was handling practically all of the distribution of gasoline directly to the public, and he had various devices for actually dishing that gasoline out to the public, such as storage consisting of steel drums and above-ground tanks located in his garage, from which he drew the gasoline in measures or other similar devices. There were, even back ten years ago, I think, certain crude pump and tank outfits, so-called, but I do not think they were anywhere near

as complete and adequate as the equipment of today.

Q. Do you regard the modern tank and pump equipment as a necessary device to meet the trade? A. Absolutely; that, or some better or similar device which has not yet come to my attention.

Q. Do you believe that further increase in installations of tanks and pumps, if you have a judgment on the matter, will be necessary to meet the demand for gasoline in the future? A. My belief is that the facilities for getting the gasoline to the public in in-
1361 creasing quantities required by the public, have not kept pace with the demand for such service, except in, possibly, some few places. Generally speaking I consider that the enormous growth in the automobile industry is going to necessitate further and broader distribution of the gasoline facilities.

Q. Do you make these installations, under these lease agreements, in particular territories, or is it a general practice? A. Quite general.

Q. Are those installations confined in any measure to towns and cities, or are they made in the country as well? A. In the country as well.

Q. What territory is under your jurisdiction? A.
1362 All that territory north of the South Carolina line and east of the Mississippi River, extending up to the Canadian Border.

Q. Is the Texas Company engaged in business in all of those states, included in that area? A. No; not in all of them. I can give you, by states, if you prefer, just what the territory is. I said I had jurisdiction over that territory. That does not mean that we are doing business in all of those places. I do not think we are doing business in Kentucky for example.

Q. Tennessee? A. Tennessee is in the southern territory. I should say with the exception of Kentucky

we are doing business in all the other states within that territory.

Q. By "doing business," do you mean that you are marketing your product to the ultimate consumer in all of those states? A. No.

Q. That is, marketing the gasoline to the ultimate consumer? A. Outside of Kentucky, we are marketing to the consumer ultimately, but through what we call, in some instances, distributors. They are not our own station facilities. They are owned and operated by what we call distributors, but we sell the product to them outright, and they market it under 1364
our trade-mark brand.

Q. What I am wanting to get at is, in about how many states in your territory does the practice apply? A. Let me give you the states.

Q. All right. A. Starting with Maine, New Hampshire, Vermont, Rhode Island, Connecticut, Massachusetts, New York, Pennsylvania, Ohio, Delaware, New Jersey, Maryland, District of Columbia, Virginia, West Virginia, North Carolina, Indiana, Illinois, Michigan, Wisconsin, Kansas—we have Kansas City on one side, of the river, and the southern territory has it on the other, and Missouri.

Q. Mr. Gatchell, your business does not cover the 1365
whole territory in each of these states named, does it? A. What do you mean by covering the whole territory?

Q. I mean do you consider that you are doing business all through each of those states? A. Oh, by no means. I want it understood that this list of states given is states in which we have some business. Our principal business, you might say, is along the Atlantic Seaboard and in the New England states, and states like North Carolina and Virginia and places like that. We only have one district which I have any-

thing to do with that is back from the Seaboard, and that is the Chicago district. We only operate eleven states in that district.

Q. Are you extending your business in this territory now? A. Yes, sir.

Q. Is this practice of leasing pumps at a nominal rental used by you as a method for extending your business in this area? A. Yes, sir.

Q. I think I have already asked you this question, but I want to make certain of it: Do you regard this leasing method an economical method of pushing your
1367 trade and extending your business? A. Yes, sir.

Q. In purchasing these equipments from the equipment manufacturers, are you required to make any agreement, by them, as to the method by which you will place those equipments? A. None whatever. You mean as far as restricting us is concerned?

Q. Yes, are you restricted in any way as to your handling of those equipments? A. Not at all.

Q. Are you allowed to resell Bowser equipments? A. Yes, sir.

Q. Have you had any difficulty in getting all the equipments that your company needs? A. Yes, sir.

Q. To what period of time does your answer apply?
1368 I mean, recently or some time ago? A. Particularly to the last nine months.

Q. Have you any unfilled orders, at the present time, for equipments? A. I cannot testify directly as to that, because I am not in close enough touch with the purchasing department. I know that, generally speaking, we have been delayed very materially in the equipments which we have ordered. Sometimes we have been several weeks or months before we could get the equipments that we ordered. That applies to all pump and tank companies that I know of.

Q. Do you know, Mr. Gatchell, whether with any of the companies you have dealt with before, you could get an order filled immediately for equipment? A. I should not know just exactly how to answer that. You say "before"; what do you mean?

Q. I mean from any of the companies from whom you have heretofore bought equipments, could you go to them now, do you know, and get an order filled at once? A. I do not know, as an absolute fact, but my impression is that I could not.

Q. You have already testified, have you not, that your purchases of equipments are direct from the 1370 manufacturer? A. Yes; direct from the manufacturer.

Q. Mr. Gatchell, what would be your estimate of an average cost of the so-called filling stations or service stations? A. Do you mean as regards our price, or the filling stations—

Q. I suppose it must vary in different localities; but some general average is what I am asking for. A. I can testify as to that in regard to our own practice pretty closely, and I can give you a rough guess on what I think the other people are spending for them, if that will answer the question.

Q. Just state, with those facts in mind, what you 1371 believe to be the average cost of a filling station. A. I should say from $8,000 to $15,000. That is what you might call an ordinary filling station. There are filling stations that cost a great deal more money than that; but that is about an average of our practice, on what filling stations we have put up. That is an average. Please emphasize that. That is a general average.

Q. What does that include—the purchase price of the ground and the cost of the construction? A. Sometimes it includes the ground and sometimes it

1372 *Frederick D. Gatchell, Cross*

does not. Sometimes the ground is leased. It includes the filling station building always, and certain pump and tank equipment, and driveways, and everything that is necessary to make a complete outfit.

Q. In those filling stations, are these equipments installed? A. Oh, yes. When you say "these equipments," you refer to the pump and tank?

Q. Yes. A. Yes; that is the only method I know of vending gasoline now, through pump and tank equipment.

1373 Q. I asked you some time ago, Mr. Gatchell, whether you know if an order now placed by you with any of the companies with whom you have been purchasing equipments heretofore—whether you knew if such order would be promptly filled, and your answer was in the negative? A. My answer was that I could not say absolutely from direct knowledge, but my impression was that it would not be filled.

Q. What was the reason for your answer, that you think it would not be promptly filled? A. Because they have all got so much business that they cannot fill the orders they have got now.

Mr. Nesbitt: That is all.

1374 *CROSS-EXAMINATION by Mr. Zechiel:*

Q. How many installations under these lease contracts do you have, about? A. I cannot say exactly on that. I can give you an estimate or an approximation, if you wish it.

Q. As nearly as you can. A. I could give you an answer if I looked up our records.

Q. That is not necessary. I am not that particular. I just want it approximately. A. I should say approximately 2,000, possibly.

Q. What per cent of your business is done through such installations? A. When you say "what per cent of our business" is done through such installations, do you mean in regard to—for instance we do a large business, as all companies do, in tank car shipments direct to customers, that do not go through any facilities at all, except our loaning facilities at the terminal. I want to make my answer clear, whether you want that included or not.

Q. Let us talk about retailers? A. Oh, retailers?

Q. Yes. A. I should say ninety per cent.

Q. You do not do much business through customers 1376
who own their own equipment? A. I understood you to mean what percentage of business is done through pump and tank equipments.

Q. I will repeat my question: What per cent of your business is done through leased equipments, referring to your business with retailers? A. Oh, I should say, under that question, maybe sixty per cent, or sixty-five per cent.

Q. Sixty or sixty-five per cent? A. Yes.

Q. Through what outlet does the remainder go? A. Through pump and tank equipment that is owned by others than ourselves, and to manufacturing concerns who have facilities of their own, cleaning and 1377
dyeing establishments.

Q. I thought we had agreed that we would limit this to retailers. Are you still thinking of retailers? A. No. Then I will say through our own equipment, or through equipment owned by other people—

Mr. Speer: When you say that, what is your percentage?

The Witness: I said sixty or sixty-five per cent went through equipments leased by us.

Examiner Dunham: Mr. Witness, I do not know whether counsel intended to include those that were

leased for a nominal amount and those that were loaned. It seems there are two classes: Some of them were loaned and some of them you let them have for a nominal rent?

Mr. Zechiel: As far as this examination is concerned, Mr. Examiner, we are referring to either one, without distinction. As a matter of fact, I think they lease them all.

Mr. Nesbitt: It is all under the lease agreement.

1379 Examiner Dunham: You intend your answer to mean that the sixty, or sixty-five per cent, is distributed through the tanks that are leased or loaned?

The Witness: Yes.

Examiner Dunham: I think that is clear.

The Witness: I have no figures before me. You may ask me some questions in this connection that I will give you as nearly approximate answers to as I can, but I may be fifteen or twenty per cent off on a thing of this kind. However, that is my impression.

Examiner Dunham: I take it that an answer of that sort could only be approximately correct.

The Witness: That is what I am trying to an-

1380 swer.

By Mr. Zechiel:

Q. Now, you say, in your last answer to my question, in answer to the question through what facilities or avenues you distribute the balance, you said through pumps owned by the retailers themselves and through your own equipment. To what were you referring when you said your own equipment? A. I mean equipment leased or loaned by us, or equipment installed at our regular filling stations or service stations, and so forth.

Q. About what per cent is that? A. I said sixty-five per cent, I thought, was vended through equip-

ment leased or loaned by us; and naturally the rest would be, making one hundred per cent, through facilities owned by some one else.

Q. I rather doubt whether that is true, even though it seems to be against yourself to say so. I think you mean to say the rest is through your service stations, owned by you, and through pumps owned by other people; is that right? Let us get this right. There are three avenues of distribution. A. Yes, sir.

Q. You have leased and loaned pumps? A. Yes, sir.

Q. And you have pumps owned by somebody else? 1382
A. Yes.

Q. And you have your service stations? A. Yes.

Q. All right. Under lease and loan, what percentage do you distribute? A. I should say sixty-five per cent.

Q. Now, through pumps owned by somebody else? A. You say lease and loan; that does not include our own filling station equipment. Do you want to treat each one of those three classes separately?

Q. Yes, I am trying to get them into three groups. A. Let me see if I can get them into three groups, then. I would say sixty or sixty-five per cent lease and loan equipment; ten to fifteen per cent through 1383
our own station facilities, filling stations and service stations; and the balance through facilities owned by others than ourselves.

Q. Where do you do business in Ohio? A. Youngstown.

Q. Is that the only station you have there? A. That is the only station we own ourselves. We have several what we term distributors in Ohio.

Q. How large a business do you do in the State of Ohio? A. Is that a question that I have got to answer—how much business we do in the State of

1384 *Frederick D. Gatchell, Cross*

Ohio? I do not know myself, but I was wondering whether I had to answer that. I do not know, as a matter of fact.

Mr. Nesbitt: Mr. Zechiel does not mean that.

Mr. Zechiel: No. As a matter of fact, the question I am asking has nothing to do with your case, I think.

Mr. Nesbitt: He just wants general information.

Mr. Zechiel: I am getting this general information
1385 becouse of several matters of this sort, and I thought I would ask you while you were here.

The Witness: As a matter of fact, our largest business in Youngstown is lubricating business, and has nothing to do with gasoline at all. We only do, I should say, 200,000 gallons a month in gasoline at Youngstown.

By Mr. Zechiel:

Q. You do not do very much business outside of Youngstown in Ohio? A. No.

Q. So that you are not, really, very actively engaged in the State of Ohio? A. No.

1386 Q. But in all the states you have named you do lease and loan pumps? A. No, I do not say that.

Q. I am asking you. A. I said we did business. I really cannot answer that. I do not think we do, as a matter of fact, in all these states.

Q. Do you know in what states you do engage in this practice? A. If this will answer your question, I can say that ninety-eight or ninety-nine per cent of the lease and loan pump and tank equipments, as far as we are concerned, has been done in the New England states, New York, Pennsylvania, Delaware, New Jersey, North Carolina, Virginia, Maryland, the

District of Columbia; in other words, the border states.

Q. About how much of your business is done in those states? What percentage of your business? A. I should say that seventy-five or eighty per cent of our total business is in those states enumerated above. This applies, all the while, to retail business, does it not?

Q. Yes; we are talking about the business that has direct connection with leasing and loaning of pumps. A. All right; and this only refers to gasoline?

Q. So far, only to gasoline. A. Yes. 1388

Q. You say you bought these pumps, and then stored them in warehouses in the various states, and sell your orders out of those warehouses. In filling those orders, do you ever carry the pumps and equipments across the state line? A. Yes. I said, I think, if you will read my answer, generally we do that; that is our practice generally. We have, on occasion a rush order, or something, and ship a pump and tank equipment direct from the factory to some individual location in some state, which necessitates carrying it across the border.

Q. To what extent do you carry from your own storage warehouses across state lines? A. In very 1389
few cases. You mean the pumps, or our product?

Q. I am talking about the pumps, now. A. I will have to qualify that by saying that in the majority of cases we do not; but we do sometimes. I thought you referred to our product.

Q. I am talking about the pumps, at present. A. All right.

Q. Just how do you handle these pumps when you have them shipped in to you? I want that rather in detail. I want to get a picture of it. A. How do we handle them?

1390 Q. Yes. Just what is the mechanical process from the time you order a pump until it is finally installed with the retailer? A. We place our order with the pump and tank people for, say, a carload of pumps. We generally have a contract with the pump and tank people to supply us so many pumps over a certain period of time, and we draw against that order as we see fit, asking them to ship a certain number of pump and tank equipments to, say, for example, Boston. We have a warehouse at Boston, and they ship them in a car, and we unload them at our warehouse there,
1391 and put them in stock, in storage. That gets the pumps on the ground there. Now, do you want to develop how they are taken out?

Q. Yes; go right ahead. A. We have agents, local agents, in all towns where we do business. We have salesmen, and possibly somebody will call on the local agent and say they want to distribute gasoline, or want to open up a station for the distribution of gasoline, or we may be selling a man lubricating oil, or something, or one of our representatives is there, and the question is brought up either by the agent or by the party who wants the pump and tank equipment and it leads to negotiations for the placing of a pump
1392 and tank equipment to handle our product, and then the request is sent into the Boston district office, and from there it is sent down to the general office in New York, and it is either approved or disapproved, and if it is approved the pump and tank equipment is taken out of the stock and shipped to the man's place, or taken on a truck to the man's place, if it is a nearby point, and then our installation force goes around and installs it.

Q. When you store these, do you store them in the same wrappings and gratings in which they are sent to you from the factory? A. Of my own knowledge I cannot testify as to that.

Q. What is your belief about it? A. My belief is that we do; because it is easier to ship them out again the way they come in than it is to unpack them.

Q. Now, as to your oil products. Are you the owners of fields, developing fields yourself—the Texas Company—if you know? A. Yes; I think we are.

Mr. Hayes: There is no doubt about that, is there?

The Witness: No, sir.

By Mr. Zechiel:

Q. You also have refineries, have you not? A. Yes. 1394

Q. Where are your refineries located? A. Port Arthur, Texas, Tulsa, Oklahoma, and Gates.

Q. Gates is where? A. Texas; Lockport, Illinois; Port Natchez, Texas. Those are our principal refineries.

Q. How do you get your products to the refineries from the field? A. Most of them by pipe line.

Q. Some of it in tank car lots? A. Some of it. For instance, our Lockport refinery gets all of its product in tank cars.

Q. And when it leaves the refinery, how does it leave? A. In tank cars, or tank car barge, or in large tank steamers. 1395

Q. You send some by rail in tank car lots, I presume, do you? A. Yes; we ship out by rail; but take it at Port Arthur refineries, for instance, and that is the supply for all of these Atlantic Coast points, and that stuff comes up in tank steamers.

Q. When it gets off the steamer? A. Then it goes into what we call terminals; that is, the point where the steamer discharges its cargo, the bulk cargo, into large tanks at the terminal; and from there the tank

cars are loaded out to the distributing stations or the refined stations that I described before.

Q. And these refined stations, just what are they, again—physically, I am talking about now? A. They consist, depending upon the size of the station built and required, of local bulk tankage, from which this tank car shipment which I just described as moving from the terminal is unloaded again into the local storage, and from the local storage is loaded into tank trucks.

Q. When you say it is unloaded, do you mean the
1397 tank is unloaded, or the goods, the gasoline itself is unloaded? A. The gasoline itself is unloaded.

Q. Is placed in another tank? A. Yes. For instance, the ordinary small station tankage will hold, say, 18,000 to 25,000 gallons, and a tank car holds about 8,000 gallons. That is pumped from the tank car into the local storage. That station, therefore, consists generally of a lubricating warehouse and pumps, office, garage and of course if horses are used, a stable. That is the local plant, you might say, out of which the gasoline goes to be distributed through these pump and tank equipments.

Q. To the retailers? A. Yes. As a matter of
1398 fact, if you want to know what we consider a complete outfit, we actually include in an outfit these pump and tank equipments; that is, while they are not on the station property, they become part of our investment at that station. They are not on the property itself, but they become part of our investment for that station, the local station.

Q. That is, when you think of going into a new area, a new territory, you include as a part of your prospective investment, a certain number of pump and tank outfits? A. Yes, sir.

Q. You also deal in lubricating oil? A. Yes, sir.

Q. How is that handled? A. You mean with respect to the retail dealer?

Q. I just asked you to describe the gasoline business, and how you handle your lubricating oil is my present question. A. Lubricating oil, except to the largest agents where we also have storage for lubricating oil, is generally shipped out of these terminals in wooden or steel drums.

Q. Are they shipped across the state lines, the lubricating products? A. Oh, yes.

Q. In the steel tanks or containers? A. Yes; anywhere. 1400

Q. Is it or is it not a fact that you sell the lubricants in those containers that you ship across the state line? A. No. In fact, just to the contrary. Many times we retain ownership of those containers.

Q. No; you do not get my question.

(The reporter repeated the question as above recorded.)

The Witness: I thought you asked whether we sold the containers also.

By Mr. Zechiel:

Q. No. A. Of course we sell the lubricants that 1401
are shipped in those containers. We sell the lubricants.

Q. Who are your competitors in this eastern territory? A. Do you want me to name all the competitors that I can think of?

Q. No; just your main competitors here in this eastern territory. A. The Standard Oil Company of New York; the Standard Oil Company of New Jersey; the Gulf Refining Company; the Atlantic Refining Company, the Sinclair Company; the Sun Company. If you want the principal competitors, those are the ones.

1402 *Frederick D. Gatchell, Cross*

Q. What is the capitalization of your company? A. The present capitalization, I believe, is $130,000,000 recently increased from $80,000,000 to $130,000,000.

Mr. Nesbitt: From $85,000,000 to $140,000,000. The increase has not become effective yet. The capitalization at the present time is $85,000,000.

By Mr. Zechiel:

1403 Q. Do you also have agency agreements with your customers? A. Relating to pump and tank equipments?

Q. Yes. A. We have a very few, but it is not our general practice at the present time.

Q. Why do you use the lease and loan system in preference to the agency system? A. Because we consider it more economical than operating agencies all over the country.

Q. Why is that? A. If you appoint an agent, you have got to go through certain accounting methods and one thing and another that are quite burdensome at times, especially involving a small business. For instance, if a man is an agent of ours, he has to send
1404 in reports; he is handling our product, that belongs to us, and he has to send in reports showing what he is doing with that product, in the way of many daily reports and weekly reports and monthly reports, and things like that, that our accounting department requires. If a man buys our product outright and distributes it through facilities offered by us, the product belongs to him, and after we sell it and get our money, we do not have to bother with it any more. It is a much more economical way, and we have considered it very much to be desired.

Q. You never tried to sell these equipments, as a practice, did you? A. No, sir; we have never maintained any sales organization for the sale of pump and tank equipments.

Q. This twenty-five per cent of customers that you have that own their own equipment, you testified that they are practically as continuous as those who have your leased equipment A. I say so, yes, sir.

Q. What advantage is it to you to have a leased equipment rather than to do business through pumps owned by the customers themselves? A. No advantage whatever. 1406

Q. Is it not a fact that the largest per cent of your lease installations are made in the more highly competitive areas in which you are engaged in business? A. No, sir; I would not say so. We install pump and tank equipments where we have no competition at all, sometimes.

Q. Is that a common practice? A. It is not common, because there are very few points where there is no competition.

Q. But there are a great many points that are more highly competitive than others, are there not? A. Yes; undoubtedly.

Q. Do you establish pumps as freely under the lease 1407
and loan agreement in those lesser competitive areas? A. I do not think we discriminate at all, when we want distribution in some place. Whether there is competition there or not, we use the pump and tank equipment to get the proper distribution of our gasoline to the public.

Q. Then your purpose in using the lease and loan is wholly one in order to distribute your gallonage? A. Merely one of facility, to offer facilities. Yes, I will answer it is. Yes—to distribute gallonage.

Q. In your lease and loan outfit, what percentage of the retailers product where you have lease and loan outfits passes through your equipment, and what percentage is the property of some other company, a competitor of yours? A. Where there is only one pump and tank equipment, if that belongs to us, it is our trade-mark brand gasoline, we assume that all of our product passes through there.

Q. Well, now, as a matter of fact, if you know? You say you assume. A. That is our belief, or intention, to have our product pass through entirely.

1409 Q. So far as you know, are you successful? A. I think generally speaking we are, yes.

Q. Why do you say that the lease or loan method of doing this business is the most economical method? A. Because I believe it is.

Q. Compared with what methods is that true? A. Compared with, say, establishing agencies for the handling of the product in the same identical method except that the product belongs to us, and except that we have to hedge the thing around with extensive safeguards in the way of bookkeeping and other cumbersome methods.

Q. Compared with business through equipments that are owned by the garage man himself, what would

1410 you say? A. Comparing what—lease and loan equipments?

Q. Yes. A. The only difference there is is in the original investment. In other words, you might say, naturally, if we could get the distribution we want, in the places we want it, we do not care whether the man buys the pump or whether we furnish it to him.

Q. You don't care. Is that exactly the truth, that you do not care? A. That is what I said, yes. We would just as leave furnish it to him, if he wants to buy his equipment, as not.

Q. Then there is no economic superiority of an equipment owned by the retailer himself over your lease and loan proposition, so far as you are concerned; you would just as lief give him the pump and tank for his use, as to have them use his own equipment? A. I said provided we could not get an installation at a certain point where we wanted to.

Q. Just note the question, please.

(The reporter repeated the question as above recorded.)

Examiner Dunham: Give us as clear cut an answer to that as you can. 1412

Mr. Hayes: It is a sort of a double barrelled question.

By Mr. Zechiel:

Q. Yes. You can answer twice. Separate the question, if you prefer. Answer the first one. I thought the second was putting the question a little plainer than the first. That is the reason I repeated it. A. I will say, as regards the first part of it, that it makes no difference to us if we can get a customer who has his own pump and tank equipment, we will supply him gladly. On the other hand, as to the second part of the question, if we cannot get a certain location or a 1413 certain distribution that we want, we will furnish equipment to open up a location of that kind.

Q. Now, my exact question is: Which do you prefer? A. I will say we prefer neither. I am neutral on the question. If the pump and tank is there and owned by the dealer, or garage man, all well and good: but if it is not, and the location is such as we want, we will consider it a facility that we will supply.

Q. Then suppose you had an opportunity to sell such an equipment, or some pump company had an opportunity to sell an equipment to a prospective cus-

tomer; would you just as lief furnish him that pump and tank free as to sell the equipment to your prospective customer? A. We do not sell pump and tank equipments except on request of the prospective customer himself, if he wants to buy it.

Q. Suppose he requests it, then? A. If he requests it, yes, we would sell him the pump and tank equipment.

Q. Now, which would you prefer doing? A. Which would I prefer doing?

Q. Yes. Give him one or sell him one? A. If he
1415 would buy it, I would be glad to have him buy it.

Q. You would prefer doing that? I know you would be glad to have it, but would you prefer doing it, or would you rather lease and loan him one under your agreement? A. I think I would rather have him buy the outfit, if he would buy it.

Q. Then so far as you are concerned, the most economic method of marketing your product is to market it through pumps owned by the retailer himself; isn't that true? A. Yes.

Q. On direct-examination you said that you did not believe there were now enough installations to take care of the public demand. What did you mean by that?
1416 A. I mean taking into consideration the enormous increase in the demand for gasoline, due to the production of automobiles, that I do not consider the distributing facilities have kept pace with the demand.

Q. You were not speaking, then, of the number of distributing centers, but you were speaking of gallonage, or capacity of distributing centers? A. I am speaking of both; both the size and number. I am speaking generally.

Q. Then do I understand you to say that you think that the tanks and pumps are not near enough to each other in most competitive areas? A. If you will cut

out "in most competitive areas," and substitute "in some competitive areas," I will say no, I do not think they are close enough together.

Q. In some of the competitive areas? A. Yes.

Q. Is that the same area about which you were speaking when you say that the equipment is not large enough to handle the public demand? A. My statement about the facilities and equipment was a general one. I might say that, in my opinion, the facilities generally for the distribution of gasoline to the public have not kept pace with the demand for such.

Q. Now, I separated those facilities for distribution 1418
into two parts: The question of gallonage and the question of numbers. A. All right.

Q. You said you thought, so far as numbers were concerned, that in some areas there were not numbers enough. A. That is correct.

Q. Would you say, then, that in most areas the question is one of gallonage rather than numbers? A. No; I do not believe I would.

Q. Would you say that in most areas, then, they ought to have more numbers of distributing centers? A. I do not like to say "most areas." I would say in many areas they ought to have more facilities.

Q. Would you say that "many" is greater or less 1419
than half? A. I would say it is greater than half.

Q. Then "in most" is all right? A. All right. Let it go at "most."

Q. Then in most areas you think there ought to be not only more gallonage, but more tanks and pumps? A. Yes; larger facilities for gallonage and more pumps.

Q. That would be true in the large cities, do you think? A. Yes, generally speaking that is where the demand for gasoline is.

1420 *Frederick D. Gatchell, Cross*

Q. And it is your opinion that in the large cities there are not enough actual points of distribution of gasoline? A. Yes, sir.

Q. Why do you say that? A. Why do I say that?

Q. Yes. A. Possibly from observation. I guess you have been in large cities sometimes, even with very adequate facilities, apparently, for the distribution of gasoline, and you have seen fifteen or twenty cars standing in a filling station waiting to get served; and you have seen cars along the streets in front of pumps where they allow you to vend from the curbs,
1421 ten or fifteen cars in line—I have; I don't know whether you have seen that or not. The public demands quick service and good service. I have actually seen people drive away from a very good sized filling station because they could not get served as quickly as they wanted to get served.

Q. You are acquainted with the service station business out in the Indiana territory? By that I am speaking of the Standard Oil of Indiana territory. A. I am slightly, yes.

Q. What is your judgment about it—your experience about it rather than your judgment, in that territory, where there has been an enormous increase in
1422 service stations? Have the number of curb pumps increased or decreased? A. I could not say as to that. I don't know.

Q. You don't know? A. No. I know that the number of filling stations has increased materially, but as to the effect it has had on the pumps I do not know.

Q. You do not know whether pumps in the vicinity of the service station have increased in number or decreased in number? A. I do not actually know.

Q. Do you know that in any territory? A. Yes; I know that in some territories they have increased, even in close proximity to the filling station.

Q. Do you know of any territory where they have decreased in number? A. I do not happen to think of any just now.

Q. Do you think that the on-coming—I am correct that service stations are coming into use very rapidly, am I not? A. Well, I think that is proven out by the fact that there is a number of stations being built all the while.

Q. It is a fact that service stations are increasing greatly in number, is it not? A. They seem to be, yes.

Q. Do you think the increase in number of service 1424
stations will have a tendency to decrease the number of ordinary curb pump equipments in the vicinity of the service station? A. Unless they are built faster than they are being built today, I do not think so. Of course there is a possible chance that if you build enough service stations, you can cover the same general character of service in a better way than you do with your individual pump and tank outfits.

Q. That is what I was getting at. So that, as a matter of fact, it is largely gallonage, instead of numbers, is it not? A. Well, it is gallonage coupled with convenient location, which means numbers of places.

Q. But the on-coming of the service station rather 1425
demonstrates that it is gallonage instead of numbers, does it not? A. No; I do not think I would say that.

Q. All right. Do you have service stations, yourselves, many of them? A. We have some, yes.

Q. What has been the economic reason for establishing service stations as far as you are concerned? A. Well, in certain localities, where the business warrants it, you can afford to put the investment that is necessary in a station of that character which we call a service station.

Q. So that a service station may be more economi-

cal than the lease and loan proposition? A. If it is sufficiently supported with business, yes.

Q. I am just getting at the general proposition that it may be more economical than the lease and loan equipment. A. Yes; but allow me to state that the service station, of course, is restricted to the areas where you can get a very large business.

Q. Yes. A. You could not do anything with service stations out in the country.

By Mr. Burdeau:

1427 Q. The service station is a separate branch of the business from the business of selling to garages and curb pumps, is it not? A. In the sense that it is retail business, direct to the public, it is, yes.

Q. That is just the distinction I wanted to make. A. Yes.

Q. And your price for gasoline from a service station is higher than your tank wagon price to the pump man or garage owner? A. In some cases, yes. Not in all.

Q. How long have you been assistant sales manager of the Texas Company? A. Between five and six years.

1428 Q. I understood you to testify that the Texas Company had been installing pumps and tanks under these lease agreements for only three or four years; is that correct? A. I said about three or four years.

Q. So that for a time you were sales manager, or assistant sales manager, during a period when that practice was not in use by your company? A. Yes.

Q. In what way did your company market and distribute its product during the period when it did not make use of the lease? A. Through such facilities as happened to be on hand at the places where we distributed the gasoline.

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Q. I know; but I want to know just what those facilities were. A. I think I said that sometimes they were above ground tanks, and even sometimes underground tanks, with the crude pump arrangement that they had at that time. Also in some cases I think, in some localities, they used to store gasoline in drums and take it out in an open measure, or a five-gallon tank, wagon, bucket, or something like that.

Q. Were these pumps in use at all prior to three or four years ago in the territory in which you are familiar with conditions? A. I think this type, or some other type of pump, might have been in service. In 1430
fact I know there was some pump and tank equipment, so-called, in service.

Q. Did your company initiate the practice of leasing and loaning these new style pumps? A. I do not know that we initiated it, no, sir.

Q. Was your company engaged in it as early as any other company? A. I cannot say as to that.

Q. What prompted your company to take up this plan of distribution, leasing and loaning pumps? A. The principal idea was that it was an up-to-date method of vending gasoline, and the equipment was better than the old ways of handling gasoline. It was just like all things that come along, new propositions that 1431
come along, improved methods of handling, and we adopted it as something that was necessary to carry on our business.

Q. Well, that was a question that fell within your particular duties, was it not, to consider the question of adopting that plan of distribution? A. To a certain extent, yes.

Q. Was it not because you found out that some of the competing companies had adopted that plan of doing business? A. I will say that might have had some bearing, but it was not the controlling factor.

Q. Was it not a fact that you were influenced, to a certain extent, in adopting the lease and loan plan because you were losing business to your competitors? A. We lose business all the while.

Q. I asked you the plain question if it were not a factor influencing your decision—that you were losing business to some of your competitors? A. That might have had a bearing on the situation, but it was not the controlling reason for adopting anything of this character.

Q. I understood you to say that you carried these
1433 installations as an investment? A. Yes.

Q. When you spoke of the plan of selling through a lease and loan of the tank and pump as the most economical, I assume you referred to the cost of getting your product from the refined station to the retail dealer; is that correct? A. No. I spoke of getting it from the refined station into the hands of the consumer.

Q. Is your company interested in the cost of distribution after it sells this retail dealer? A. Is it interested?

Q. Yes. A. We are, indirectly.

Q. Well, directly? A. Yes; directly.

1434 Q. In what way, sir? A. Because the distributer himself, in order to keep in business, has to enjoy a certain differential of profit.

Q. I do not quite understand that, and I want you to make it a little plainer to me. Please explain your last answer. A. Anybody that conducts a business has got to make an earning on the business, in order to keep in business, has he not?

Q. I assume that is correct. The man who owns his own pump and tank must make a profit on his business in order to keep in business; is not that correct? A. I assume so.

Q. Is there any difference in his position and the position of the man to whom you loan or lease a pump? A. Is there any difference in his position?

Q. Yes—on your theory? A. I do not see any difference.

Q. Please explain to me again in what way, with reference to what cost do you use the term "most economical" as applied to the lease and loan agreements? A. I apply it in connection with the other possible method of creating agencies.

Q. It is a method of creating agencies and not of selling to existing agencies; is that it? A. These are 1436
not agents at all, no.

Q. I am trying to get at your idea of the economy in distribution. For what reasons do you say that the lease or loan agreements are the most economical plan of distribution? A. Because I think so.

Q. I know you do, but I want your reasons for thinking so. A. All right. I have told you—as against the creating of agencies.

Q. Then your theory is that, if I understand you, it is a beneficial plan in creating agencies where none exist before; is that correct? A. No; not agencies. We do not consider these lease and loan agreements as agencies at all. These people buy our product out- 1437
right, and they sell it.

Q. You sell to a man who owns his tank and pump equipment at exactly the same cost to your company as you sell to a man who leases the pump from you, do you not? A. Exactly.

Q. And in addition you have the investment of the cost of the pump in the last case; isn't that so? A. Absolutely.

Q. Where is the economy in that arrangement, by comparison? A. The economy—if you will remember my testimony on that, I said it made no differ-

ence to us whether the man bought the pump and tank equipment or not, but if we could not secure a location, and could not get anybody to put in a pump and tank by buying, or if the man had no equipment in a desirable location, we were prepared to furnish additional facilities for that man to handle our gasoline.

Q. I understood you to say that you think the practice of loaning and leasing pumps brings in competition, or creates competition; is that correct? A. Yes.

Q. Will you please explain why that is? A. Well,
1439 I make that answer on the basis, again, of observation. I can only say that where pump and tank equipments have been leased and loaned in the last few years competition in the number of companies has increased. Possibly I could not specifically state why, but it is a fact that it has.

Q. That competition consists of loaning and leasing more tanks and pumps. Is that it? A. In some cases, yes.

Q. Bidding for trade by lending and leasing more of these equipments? A. But the funny part of the thing is that there is business for everybody there when the competition comes. Nobody has been—but
1440 you did not ask me that.

Mr. Hayes: What was your answer?

The Witness: I said that the funny part of the thing was that there was business enough for everybody in these places where the competition did come in.

By Mr. Burdeau:

Q. You stated that you sometimes found it difficult to get a sufficient number of distributing points without putting in the lease and loan tank equipments? A. Did I make any such statement as that?

Q. I think so. A. I did not say that we found it difficult. I said that in order to get to the desirable locations—if I remember correctly, that is what I said.

Mr. Burdeau: That is all.

RE-DIRECT EXAMINATION by Mr. Hayes:

Q. Will you just tell me what are the component parts of a pump outfit that you obtain from the pump manufacturers? A. There is the pump itself, which consists of certain cylinders, and pistons, that work up and down, and there is the tank, what is known as the foot valves, and the strainer, and the other numerous other little fittings around which connect the two together. 1442

Q. Do they all come in one package, together? A. No.

Q. How do they come to you? A. The pump is generally crated, and the tank is generally crated.

Q. Separately or together? A. Separately.

Q. How about the fittings? A. The fittings come, generally, in a gunny sack, or wrapped up in a separate package.

Q. So that when the pump outfit complete arrives at your place of business, it arrives in three distinct packages? A. Three or more I should say. 1443

Q. Three or more? A. Yes.

Q. When you get an order from a customer to put up a station, do you take these three or more packages to the customer's place of business and just dump them on the sidewalk, and leave them there? A. Oh, no.

Q. Is the pump, the tank and fittings, ready to open up so that you can just drop it on the sidewalk? A. Not in the least.

Q. What do you have to do? A. You have to assemble it and put it together, put the tank in the ground and connect up the piping, put in the foot valves, put the handle on the pump, and so on.

Q. I am assuming that the Commission does not know anything about this, as well as myself. When you get your pump there, complete, delivered as you say to your customer, what do you do with the tank; what is done with the tank? A. It is buried in the ground.

Q. Where is that generally buried; some distance
1445 back from the curb? A. It may be thirty or fifty feet away, or it may be ten feet, depending upon certain circumstances. There may be some ordinances or something about the distance the tank has got to be from the curb.

Q. Then what do you do with the pump? Where do you put the pump? A. If the pump is going to be located at the curb, we set it up at the curb, on a concrete foundation, and connect the pipe up to it, thirty feet of pipe back to the tank, or whatever it is.

Q. So that you make a concrete platform there, or support for the pump at the curb? A. Yes.

Q. Where do you get your concrete and the neces-
1446 sary parts to make your mixture from? A. We buy it of the local dealers, generally.

Q. And your thirty feet of pipe; does that come with the pump? A. No.

Q. Where do you get that? A. It is bought from local pipe fitters, generally, or shipped from our stock room; generally bought from the local pipe fitter.

Q. That does not come from the pump manufacturer, we will say, S. F. Bowser, or any of the others? A. No, sir.

Q. Do you generally have one or two workmen there to connect this thing up and put it in, or more?

A. I should say generally more than one; generally more than two.

Q. Then you connect up your tank, which is about thirty feet away, at least thirty feet away, with this pipe line to the pump, which has been placed on a concrete foundation? A. Yes.

Q. Do you get your tank from the same manufacturer as you get your pump? A. Sometimes, and sometimes not.

Q. Can you say, when you take out a tank to put up at a particular place, whether that particular tank came from the pump manufacturer or from another 1448
individual? A. I could not. By looking at the tank I might, by tracing a number, or something on the tank, trace it back to a certain source.

Q. I mean, just by looking at it? A. No; I could not tell whether it came from Bowser or somebody else.

Q. How much does the tank itself cost? A. When you refer to a tank, do you refer to, say, about a ten-barrel tank?

Q. Take this one-gallon stroke pump that you spoke about a few moments ago; what would the tank cost there? A. Of course the size determines it.

Q. Tell me the different sizes. I don't know them 1449
and I presume the Commission does not. A. I can give you some approximate figures on that, but I am not up on the actual cost of the stuff. I should say a 550-gallon tank, or a 10-barrel tank, welded tank, would cost in the neighborhood of $150 or $160.

Q. And the pump; what does that cost? A. A one-gallon stroke pump?

Q. Yes. A. About $150 to $160, I should say. You are speaking about installed?

Q. No; I am speaking about the tank itself—nothing about installing, now, but how much does the tank itself cost? A. I will say around $150 to $160.

Q. And the pump; how much does that cost? A. About $150 I should say, or $160.

Q. So that you have there about $310 worth of pump and tank? A. Yes.

Q. How much does it cost to install them? A. That is a very variable proposition.

Q. We will say the lowest up to the highest. A. All right; from $50 to $2,000.

Q. That is all.

By Mr. Schekter

1451 Q. Would it be correct to say that there is no such thing as a complete or uniform unit of this curb pump equipment coming from the factory directly? A. If you consider the pipe fittings a part of a complete unit, I would say not.

Mr. Hayes: Can you run the pump without the pipes?

The Witness: No; you could not run the pump unless it was connected with the tank.

By Mr. Nesbitt:

Q. Has your company considered, from an economic standpoint, the practice of leasing equip-
1452 ment at a nominal rental? A. Has it considered it?

Q. Yes; considered it from an economic standpoint? A. Certainly.

Q. And was the decision that it was an economic policy in the judgment of the company? A. Yes.

Mr. Nesbitt: That is all.

By Mr. Burdeau:

Q. Did the Texas Company ever install for a retail dealer any pump or tank at an expense of $2,000 for installation? A. I would not say definitely $2,000.

It might have been more. That was where we struck quicksand.

Q. Your company paid for it, whatever it was? A. Somebody paid for it—not the customer.

Q. The answer is that your company paid for it? A. Yes.

By Mr. Schekter:

Q. In your purchases of pumps and so forth, from the S. F. Bowser Company, has the Bowser Company at any time made it a provision in their dealings with you that you shall only deal in those pumps by way of 1454
lease or loan? A. I do not think it has ever been made a provision of any contracts we had with the Bowser Company.

Q. Has it been made a provision verbally or by any sort of understanding? A. I think the Bowser Company, as well as ourselves, at the time that they made the arrangement with us to sell us their pump and tank equipments, understood that we were going to use them for our own, as we wanted to, and that we did not expect to organize any sales force to sell pump and tank equipments.

Q. And of course understood that you would lease and loan them in the way that you have? A. I think 1455
they thoroughly understood that we were to lease and loan pump and tank equipments.

Q. Just one other question. In answer to Mr. Zechiel you said rather generally that you would just as soon deal with a garage man or retail dealer who had his own equipment, as you would lease and loan him one of these curb pump equipments. Would it be a consideration with you, at all, as to whether his equipment had a sufficient storage capacity? A. Yes, I think it would, especially in some localities, where, if we could arrange to make full load dumps to him,

it is a much cheaper operation to deliver in full load dumps than it is in the small tankage.

Q. In that event you would prefer to lease and loan the equipment? A. Yes.

Q. Thereby curtailing your delivery equipment? A. Yes. I think the expenditure would be well justified in the saving in your delivery facilities.

Q. And have you found that that is a general consideration in your general lease and loan of this equipment? A. We have taken that into consideration at times, yes.

1457

Mr. Hayes: May I make a suggestion to government counsel, and also to the Examiner? It just struck me that if all counsel in the case indiscriminately asked questions, we will be here an indefinite time, and I was wondering whether it would not be advisable and possible for each side to have one counsel examine a witness, and if the other counsel desire to submit any questions, let them submit them through that one attorney. Here we have had four examining this witness. We are all taking a shot at him.

1458

Examiner Dunham: All of us who have practiced law for any considerable length of time recognize that it is within the proper rules for one man on each side to conduct the examination. The Examiner, however, would not undertake to prevent anybody on either side from asking any questions that suited them. I would not undertake to control them.

By Mr. Zechiel:

Q. Do you install all your equipment on the lease and loan plan yourselves, or do you sometimes just have them installed? I mean, does the party who

leases them install them? A. We, in effect, install them; we either install them ourselves or pay for the installation. At one time we had an arrangement with the Bowser Company themselves for installing the equipments, but we paid the Bowser Company for the installation.

Q. At the present time you install them all? A. We install our own, except in, I think, one or two of the districts, we may have an arrangement of that kind now.

Q. If I understand you correctly, you feel that your company is engaged in an economic practice in in- 1460
stalling a large tank where the installation of a large tank enables you to make a full dump haul? A. Yes.

Q. And that that is the reason for installations in those cases? A. Yes, that has a bearing.

Q. It would be possible, would it not, with the same idea in view, to fix a price for full dump hauls. A. That has been done in some cases.

Q. It would answer the same purpose? A. Yes.

By Mr. Speer:

Q. That would still require the haul, if the small tank was kept in? It would require that additional hauling? A. Yes; it would still require the haul, but 1461
if the company was compensated by an additional price—

Q. You would get paid for it? A. Yes.

By Mr. Nesbitt:

Q. Is it your experience that where people who are dispensing gasoline to consumers own their own equipment, they maintain, in connection with that equipment, a trade name or mark of gasoline? A. Generally they do.

Q. Is it your experience that where you have sold to such a customer he dispensed only Texas Company

gasoline through this equipment? A. My experience has been that they dispense through the pump what the trade-mark brand that they are supposed to dispense shows. There are some people in all businesses that are crooks, but generally speaking, I say the trade-mark brand displayed on the pump is dispensed through the tank and pump.

Q. That is regardless of whether the equipment is leased or owned, or how it is installed? A. Regardless.

Q. Would you allow any other brand of gasoline to
1463 be distributed under a Texas Company mark? A. Not if we knew it.

By Mr. Zechiel:

Q. Where the customer owns his own equipment, is there a sign on that equipment? A. Generally there is.

Q. Whose sign is on there? A. Whoever he is doing business with.

Q. So that if you were selling him gasoline, he would have your Texas "Texo" sign on it? A. Yes.

Q. That is a globe on top of the pump? A. Yes.

By Mr. Speer:

1464

Q. And if you go into a community to build up a business, and you find some one that has his own equipment who is willing to sell your gasoline and put up your sign, you are satisfied? A. Yes, sir.

Q. Your purpose, as I understand, is to get your product to the consumer under your trade-mark? A. That is the main purpose.

Q. And to do that you have got to have stations which consist of the tank and pump through which it is to be sold? A. Yes.

Q. And if a man who owns such an equipment is not willing to sell it, you immediately try to get a

location and put in equipment of your own? A. If we want distribution in that locality, yes.

By Mr. Zechiel:

Q. Do you mean that if John Jones, who owns an equipment of his own in a community, refuses to buy your gasoline, then you install some such equipment in that community, in order to get an outlet for your goods? A. Yes; I would say that if, through the facilities already created, we have no source of outlet for our gasoline, and if we want distribution in that locality, we are willing to furnish pump and tank 1466
equipment to get that distribution.

Mr. Zechiel: That is all.

(Witness excused.)

Examiner Dunham: We will adjourn until tomorrow morning at 10:00 o'clock.

Whereupon, at 4:20 o'clock P. M., on Dec. 1, 1919, an adjournment was taken until December 2, 1919, at 10:00 o'clock A. M.

New York, N. Y., December 2, 1919, 10 A. M. 1467

Met pursuant to adjournment.

Present: Parties as before.

C. EDWIN YOUNG, was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct-examination by Mr. Speer:

Q. In what business are you engaged? A. Petroleum products.

Q. With what company are you connected? A. Standard Oil Company of New Jersey.

Q. What position do you hold with that company? A. Sales agent.

Q. How long have you held that position? A. About three months.

Q. Prior to that time were you with the company, and what was your position? A. Manager of the Newark, N. J., division.

Q. Did you have charge of sales in that position? A. Yes, sir.

1469 Q. How long have you had to do with the marketing and selling of gasoline and other petroleum products? A. I have been with the company thirty-six and one-half years.

Q. State whether or not in the dispensing of gasoline and other lighter oils it is necessary to have a special container in which they are kept or stored while being dispensed to the public? A. Yes.

Q. Originally what containers were used for that purpose? A. Mostly small storage tanks, largely above-ground tanks.

Q. Before the use of tanks came in were barrels or steel drums used? A. Yes, barrels and cans and
1470 small 50-gallon tanks; anything they could get that would hold gasoline.

Q. Was it the practice when oil or special or lighter oils were being retailed to the public to loan the barrels or steel drums in which it was shipped to the retailer to contain the product while being sold and to return them afterwards to the seller? A. Yes; mostly wooden barrels in those days; there were some steel barrels, but mostly wooden barrels.

Q. Since the use and demand for gasoline has largely increased what is the recognized facility or equipment now used to dispense that product to the

consumer, especially to the automobile trade? A. Larger storage tanks were required and the introduction of curbstone outfits on the curb has made it much more convenient for the public to secure their gasoline while in transit.

Q. That outfit consists of what? A. A storage tank, a pump and generally a pedestal with a globe on the top of it, with its connections.

Q. What is the globe used for? A. For advertising the trade-mark, an electric light in the interior of it for night, and, of course, in the day it can be seen.

Q. Is such a facility or equipment necessary in 1472
order to dispense the product to the automobile trade? A. Absolutely. I do not think the public would stand for any other method of delivery.

Q. After this equipment came in use for dispensing the product to the public state whether or not the former habit of loaning barrels and steel drums was also applied to this facility or equipment? A. I do not quite understand that.

Q. You have stated that formerly it was the practice to loan the barrels and steel drums. Now, did that practice of loaning the equipment or container also come into vogue with the introduction of this new facility? Has it been in practice, the loaning of 1473
this pump equipment, has that been in practice? A. That has been in practice about five years.

Q. And how recently has this placing of curbstone equipment arisen? That is recent, too, is it not? A. About five years, that is what I meant.

Q. So that the practice of loaning as I understand practically began with the use of these curbstone equipments? A. Yes.

Q. Does your company distribute gasoline to the automobile trade, to the consumer? A. Yes, to the consumer.

Q. And do you do that under a trade name or mark? A. Yes.

Q. Is that trade-mark a valuable business asset? A. Very.

Q. How has it become so? A. By standardizing the quality of gasoline and advertising and introducing it to the public so they know the brand and ask for it.

Q. In order that the public may know that they are getting your brand of gasoline what is done or what is placed upon the equipment or station at which the
1475 delivery is made to the public? A. A globe is on the curbstone outfit and frequently there are signs on the building.

Q. In marketing your product and delivering it this way to the automobile trade what facilities are required; the entire equipment that you use; describe it? A. For deliveries?

Q. Yes. A. Well, now, it is mostly motor trucks or horse-drawn vehicles.

Q. First, do you ship the gasoline and what do you do with it, what is done with it? A. We receive the gasoline in either drums or in tank cars and pump it into the storage tanks from which it is drawn in
1476 the motor trucks or horse-drawn vehicles and carted and delivered to the storage tanks.

Q. You establish a storage station where you erect tanks? A. Yes.

Q. What else have you there besides tanks? A. Pumphouse, warehouses, offices and general station equipment.

Q. Garages for your trucks? A. Garages, yes, and stables.

Q. And then you have a certain storage capacity there? A. Yes.

Q. What is the rest of the equipment which you have? You have already mentioned tank wagons, I believe. A. Tank wagons and motor trucks.

Q. And what other facility for finally dispensing it to the public, in addition to the tank wagons? A. Well, we have, of course, the barrel and package equipment.

Q. And when you do not use it in barrels how is it dispensed to the public? A. It is dispensed through these curbstone outfits.

Q. Do you consider those a part of your facilities? A. They are an immense outlet for dispensing gaso- 1478
line, yes.

Q. Do you know the amount of investment that your company has in loaned outfits at this time? A. Approximately.

Q. Could you give the amount in dollars, approximately? A. About $1,300,000.

Q. Do you also sell your gasoline to garages and other dispensers who have their own equipment in the way of pumps? A. Yes.

Q. State whether or not your arrange with those customers of yours to carry your sign and trade-mark over their equipment or at their garages? A. We do, where they sell nothing but our product. 1479

Q. State whether or not that is a general practice as to those who own their own equipment or what is the general practice of those who own their own equipment, as to whether or not they sell one brand of gasoline or whether they mix it and keep selling different kinds. A. They are liable to handle one product of one of the oil companies, whichever one they may select.

Q. Have you such customers who have been taking your products for years without change, and selling it under your brand? A. Yes, we have a few.

1480 Q. What do you say as to whether the leasing and loaning of these pumps and outfits has caused more of them to be installed than would probably have been installed had the operators been compelled to purchase and own the outfit? A. I think there are a great many more installed on the loaning proposition than they would if they had purchased them on account of about three-fourths of the garages are unable to spend much money for equipment. They are mostly mechanics and have not much executive ability in business.

1481 Q. And they are unable to undertake the risk of the investment? A. No.

Q. What effect has the installation of these equipments had in the way of accommodating the public in the matter of obtaining the supply of gasoline they may need, especially the automobile trade? A. It is of immense advantage. I do not see how they could ever go back to the old practice. I do not believe the public would stand for any other method of delivering gasoline to them.

Q. What do you say as to the necessity of having these equipments distributed and installed through the rural communities for the purpose of furnishing the

1482 necessary storage to supply a community with gasoline? A. I think it is very essential, because it reduces the equipment for keeping the tanks properly supplied with gasoline. Where you have a system to cover it is essential to have large storage for that purpose.

Q. And does that have any effect in the cost to you of keeping the community supplied with gasoline from your tank wagons? A. Well, the larger the deliveries we make, the more economical the marketing becomes.

Q. If then someone had a station with a small old-fashioned tank not of sufficient capacity which you

are supplying with gasoline would it be a profitable thing for you to install an equipment of the kind with a tank of sufficient capacity so as to make the expense of delivering to him and supplying him less to you? A. Most decidedly.

Q. There has been some testimony produced at the hearing which I presume you did not hear, to the effect that the operators of these equipments even when they had a sign showing that they were selling a certain brand of gasoline, were indifferent and bought and sold through that equipment different brands of gasoline indiscriminately. What do you say as to 1484
whether or not that is a common practice? A. In very few instances, I should say.

Q. If you found someone to whom you were selling gasoline and who was dispensing it through an equipment with your sign upon it, whether it was his own equipment or leased equipment, would you acquiesce in that practice? A. Decidedly not. We would take the signs out.

Q. If you were compelled to cease from the loaning of such equipments what would you in all probability do in order to continue to furnish the public with your gasoline under your trade brand, so far as these stations are concerned? A. Well, if they did 1485
not continue to sell our gasoline, of course, we would have to remove the equipment, but we would endeavor to lease or sell the equipment.

Q. Is there a method of maintaining stations by creating the operator the agent of the company? A. Yes, that could be done, or service stations could be started.

Q. Would service stations which have been described here and which cost a considerable outlay be profitable in sparsely settled communities? A. No.

1486 Q. That is shown, is it not, or does the fact that the automobile trade do go to these curb pumps have any influence in your judgment as to whether or not the curb pumps are a convenience and a proper way of reaching the trade? A. A great convenience, yes.

Q. And as a matter of fact, they go to them instead of going to the service station? A. Yes, they go to the nearest pump usually.

Q. What do you say as to whether or not this practice of loaning equipment has tended to decrease or increase competition in the sale of gasoline? A. I
1487 find in the field we cover that the competition is increasing.

Q. What territory do you cover? A. New Jersey, Maryland, Virginia, West Virginia, North and South Carolina.

Q. Are there more companies operating in your territory now than there were a few years ago? A. Yes.

Q. What companies do operate there? A. In New Jersey which I am more familiar with on account of the short time I have had charge of the other states, the Texas Company, Gulf and Ohio Cities Gas are the most common.

1488 Q. Those are the large companies? A. Yes.

Q. Do they all market to the public under a trademark or brand? A. Yes.

Q. In addition to the large companies which are operating all over the country are these smaller companies or jobbers operating in particular localities? A. Yes.

Q. What do you say as to whether or not the number of these has increased in the last few years? A. From the short time I have had charge of the south I would say they were increasing.

Mr. Speer: That is all.

C. Edwin Young, Cross 1489

CROSS-EXAMINATION by Mr. Burdeau:

Q. You are connected with the Standard Oil of New Jersey? A. Yes.

Q. And have charge of the sales department? A. Yes.

Q. For how long? A. For about three months.

Q. Were you familiar with the selling organization of that company prior to that time? A. Yes.

Q. You had supervision of it or some connection with it? A. I was manager of the Newark division, which included New Jersey, the State of New Jersey. 1490

Q. You had some familiarity with the selling methods of your company in that division? A. Yes.

Q. For how many years? A. Thirty-six and a half.

Q. When did the practice of loaning or leasing pumps become prevalent? A. About five years ago.

Q. Do you know what company initiated that practice? A. No.

Q. Do you remember what companies were doing business in that territory five years ago? A. Gulf, Texas, Pure Oil, Crew-Levick Company and ourselves I think covered it.

Q. Do you remember which of these companies, 1491 if any, were using that practice five years ago? A. No, they started just one at a time and, of course, it was impossible to recollect.

Q. Do you recollect whether or not any of your competitors had adopted the practice before the Standard Oil of New Jersey took it up? A. I am not sure.

Q. Do you recall the reasons which prompted the Standard Oil of New Jersey to adopt this practice? A. Yes.

Q. What were those reasons, please? A. To prop-

erly accommodate the public with proper facilities for receiving gasoline at their automobiles.

Q. I am going to ask you to be a little bit more specific in the matter of properly of accommodating the public. By that I mean what business does the Standard Oil Company of New Jersey carry on? It sells petroleum products, but does it do a general retail business? A. In some cases.

Q. How does it conduct its retail business? A. Gasoline, do you refer to?

Q. Yes. A. By delivering to private garages.

1493 Q. You do not consider that—garages owned by an individual owner of an automobile? A. Yes.

Q. Not storage garages or service garages? A. No. You said retail.

Q. Does it maintain any service stations of its own? A. Only a few.

Q. About how many? A. Three or four.

Q. And you would consider the proportion of business done through service stations as practically negligible so far as volume is concerned? A. At the present time.

Q. Would you consider the volume of business done through private garages of any considerable
1494 amount? A. That is the retail you are referring to?

Q. Let us get this perfectly clear. By private garages I mean a garage owned by an individual owner of an automobile. A. Yes, there is considerable.

Q. It is considerable? A. Yes.

Q. Could you give us an approximate percentage? A. No, I have not got the figures.

Q. Is it not a fact that the large bulk and volume of your business is selling to jobbers and retailers, pump men and garage men? A. Yes.

Q. So that your business is wholesaling? A. Yes.

Q. And the service to the public depends upon your customers and not yourselves? A. Yes.

Q. About how many pump and tank outfits has the New Jersey Company installed? A. About five thousand five hundred.

Q. And in what territory are they distributed? A. New Jersey, Maryland, Virginia, West Virginia, North and South Carolina.

Q. That represents about 5,500 different customers? A. Practically.

Q. About how many customers have you among garage men and curb pump men who own their own equipment? A. I do not know the percentage.

Q. Cannot you make some comparison with the 1496
figure of 5,500 that you have given me for the leased equipment? A. Well, I suppose about three-fourths of the trade cannot afford to buy their equipment and possibly one-fourth can. Now, what percentage of that quarter, I am not sure.

Q. How long do your leases run as a rule? Of course, we have some in evidence, but I want to follow this up? A. They can be cancelled in thirty days.

Q. Do you find occasion to cancel any large percentage of these leases? A. Not very many.

Q. You have a— A. We have transferred the pumps on account of the small business, but a very small percentage of the total. 1497

Q. On account of the small business did you say? A. Yes.

Q. Has there been any cancellation for other causes, dissatisfaction with the business methods? A. Not that I know of.

Q. You would know it, would you not? A. I would be very apt to.

Q. I understood you to say that the customers you have who own their own equipment are to a large extent as steady and constant in their dealings with your company as the lessee of one of your equipments,

is that correct? A. I think it is apt to be the case of any one handling one grade of gasoline, to confine themselves to that one grade.

Q. You find in your experience that your customers who do not lease from you but who own their own equipment buy from you as steadily and as constantly as the lessees— A. Not entirely so.

Q. Not entirely so? A. No, some change.

Q. Not to any considerable extent? A. Well, some of them, some of the large customers change.

Q. I understood you to testify that in the case of
1499 owners of their own equipment you had no difficulty in placing your sign on their pump? A. Where they sell our goods, yes.

Q. Where they sell your goods. Well, that is the only man you want to have anything to do with, is it not? A. If they sell somebody else's goods we take the signs out.

Q. Certainly. You have testified that when you got a customer, whether he owned his equipment or leased it from you he was apt to continue to do business with you? A. I think they are apt to, but not always.

Q. Do you recall how many cases there have been
1500 in which you have taken signs down from owned equipments? A. No. I have kept no record of it.

Q. Now, you have said something about a method of distribution which was in use at one time, namely the steel drum. What purpose did the steel drum serve Mr. Young? A. As a transportation and storage.

Q. It was the only available means at one time of taking your product from your refining stations to the retail dealer, was that not so? A. Yes, where—

Q. That was before the day of the tank wagon delivery or distribution? A. We did not have any gasoline then?

Q. Sir? A. We did not have any gasoline then.

Q. Did not have any? A. No, we had tank wagons thirty-six years ago.

Q. Well, the steel drum or tank bears the same relation to your business as the tank wagon does, is not that so? A. What do you mean, with reference to transportation and storage?

Q. Yes. A. Yes.

Q. And it is an entirely different proposition from the curb pump; the curb pump serves an entirely different purpose, does it not? A. Yes.

Q. The curb pump has nothing in the world to do 1502
with taking your product from your station to the retail dealer, has it? A. Do you mean in the way of transportation?

Q. It has nothing to do with getting your product from your stations to the retail dealer? A. No.

Q. It is purely a device for retail distribution? A. Yes.

Q. Does the Standard Oil of New Jersey sell in bulk to jobbers? A. Yes.

Q. And these jobbers put their own brand on that gasoline, is not that so? A. I presume so.

Mr. Burdeau: That is all.

1503

RE-DIRECT EXAMINATION by Mr. Speer:

Q. In reference to the use of the drum, Mr. Young, when the drum was used, as I understand you, you not only transported it to the retailer in the drum but he also under a common practice retained the drum as a container of the gasoline or oil while it was being sold? A. For storage, yes.

Q. So that the drum not only furnished the means of transportation but furnished the container out of which it was sold? A. Yes.

1504 *C. Edwin Young, Re-direct*

Q. Now, under this method of pumping equipment and tank wagon, the two together furnish the same purpose that the drum originally did? A. Yes.

Q. That is the tank wagon transports it and the pumping equipment contains it while it is being sold? A. Yes.

Q. So in that respect the present facilities, the tank wagon and equipment, take the place of the old drum? A. Yes.

Q. Your company does a large wholesale business in addition to the marketing to consumers which you
1505 do in certain territory which you have testified. Is it not a fact that a great deal of your wholesale business goes to other states than the states in which you are marketing to consumers? A. Yes.

Q. You are selling wholesale in other states largely? A. Yes.

Q. Is it not a fact that some of the jobbers that you sell to really use your trade-mark in the dispensing of their goods and advertising it as yours? A. I do not know about—they use their own trade-marks.

Q. Are those jobbers in the territory where you are marketing to the consumer through this pumping
1506 outfits or are they mostly outside of that territory? A. The jobbers?

Q. Yes. A. They are selling business in the territory where the outfits are located.

Mr. Burdeau: Mr. Zechiel wants to cover certain jurisdictional questions and not overlap my questions.

Mr. Speer: Well, in that respect I think it is fair to say that I called this witness not as representing the Standard Oil Company of New Jersey but on our behalf and I have not touched upon any of those jurisdictional ques-

tions which may affect his company as I am not calling him for his company.

Mr. Burdeau: If it is outside of the direct-examination—

Mr. Speer: It would not be cross-examination, but if you want to call him I do not want it understood that I am producing him here as a witness for his company, and for that reason I have refrained from examining him on those jurisdictional questions.

Mr. Zechiel: I may be mistaken, because you had Mr. King and Mr. Young both on, 1508
but my recollection was that you asked Mr. Young something about how they sold their goods.

Mr. Speer: That has reference to the equipment, but I did not ask him whether they sold it over lines or not, but it was simply with regard to facilities.

Mr. Hayes: This witness was not called by the Standard Oil of New Jersey. He is called as a witness on behalf of the Standard Oil of New York. Of course, as I understand the examination is not confined to the strict rules of evidence. If that were so, Government 1509
counsel would not be permitted to go beyond the scope of the direct-examination, so that if the Government counsel want to call him as their witness it is up to them. But I feel if they go into any other matter outside of the direct-examination, they should call him as their witness.

Mr. Burdeau: In so far as purely jurisdictional questions are concerned I am satisfied that we could get the facts by stipulation or otherwise, and since Mr. Young is here it would save everybody's time to ask him a few questions.

Mr. Hayes: You can call him as your witness. Let it be understood he is called as the Government witness.

Mr. Zechiel: Well, I will not ask any further questions on cross-examination, but I do want to ask some general questions.

Mr. Hayes: As I understand it now he becomes the Government witness?

Mr. Zechiel: Yes.

By Mr. Zechiel:

1511 Q. Mr. Young, your company installs these pumps and tanks under lease and loan agreements, am I right about that? I think the answer so admits. With respect to the number of these installments, about how many have you, as a matter of numbers?

Mr. Burdeau: He has testified to that.

A. I testified to that, 5,500, and I gave the territories.

Q. Did you testify as to the per cent of your product that is sold through leased equipments? A. No.

Q. About how much is that? A. I think between fifty and sixty per cent.

1512 Q. Do you also have filling stations owned by your company? A. I had that in the evidence, about three, I think.

Mr. Zechiel: Then probably most of this has been covered. Did the witness testify more in detail about how the goods were actually brought onto the market.

Mr. Speer: No, not the shipments. I did not ask him about that.

Q. How does your company get its product usually? I am speaking with respect to petroleum products. A. In the territory I cover, I suppose you mean?

Q. Yes, in the territory you cover. A. From the refinery by boat or tank cars.

Q. Where are your refineries located? A. At Bayonne, Bay Way, Baltimore—

Q. Where is that? A. Bay Way is Elizabeth, New Jersey; in New Jersey, Maryland and West Virginia.

Q. And in West Virginia? Do you have a refinery in West Virginia also? A. Yes.

Q. And you ship your product to the refineries directly from the oil fields that you own yourself? A. Yes.

Q. And from the refinery how do you get your 1514
gasoline product to your marketing stations? A. By boat or tank cars.

Q. Now, the marketing station is the one you described for Judge Speer? A. The distributing point to the trade, yes.

Q. From these distributing points do you ship any product at all across state lines? A. No, I am speaking of New Jersey more particularly, because I am more familiar with that. I have been only in the south two or three months. But we do not ship very much. We do ship some outside the state, but only by rail.

Q. You do not deliver in your tank wagons across 1515
the state line of New Jersey? A. No.

Q. But you do not know whether you do or do not down in North Carolina or— A. Yes, I know they do not. They are confined to the different states.

Q. And the pumps and tanks which you use, where do you secure them? A. The curbstone outfis?

Q. Yes, the outfits. A. From Gilbert & Barker Manufacturing Company, Springfield, Mass.

Q. You receive them on orders I presume, do you? A. Well, we ship them in carload lots and distribute them after they are received.

1516 *C. Edwin Young, Re-direct*

Q. You have them sent in carload lots. Where are they sent? A. To central points in the different states.

Q. Do you ever have them sent to customers directly? A. Not that I can recall.

Q. After they are shipped to the central points, what happens to them? A. Then as orders are received for them they are distributed and installed.

Q. Are they then distributed across state lines, do you know? A. No.

Q. You do not know or they are not? A. They
1517 are not.

Q. These pumps and tanks are stored by you when you receive them in carloads? A. Yes, in our warehouses.

Q. And in the same crating and wrapping in which they are received? A. Yes.

Q. And are also installed from the same wrapping and crating? A. You cannot install them without taking the crates off.

Q. I say from the same wrapping and crating? A. Yes, from the cratings.

Mr. Zechiel: That is all.

1518 By Mr. Hayes:

Q. Mr. Young, what are the component parts of a pump outfit? A. A storage tank and a pump and—

Q. And fittings? A. And fittings and pedestal and a globe.

Q. Do you get all these different component parts from one and the same manufacturer?

Mr. Zechiel: Mr. Hayes, I think that the testimony of Mr. Gatchell in regard to that—

Mr. Hayes: Will you admit that he will testify to the same effect?

Mr. Zechiel: Yes.

Mr. Hayes: It is stipulated that the same questions and answers propounded to Mr. Gatchell yesterday by myself would be the same questions and answers propounded to and answered by Mr. Young.

Mr. Zechiel: Yes.

Mr. Hayes: That is all.

(Witness excused.)

1520

WILLIAM R. KING was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct-examination by Mr. Speer:

Q. In what business are you engaged? A. Vice president of the Standard Oil Company of New York, executive head of the merchandising interests.

Q. How long have you had charge of the merchandising department of the Standard Oil Company of New York? A. About forty years.

Q. What class of goods do you sell through your merchandising department? A. All grades of petroleum. 1521

Q. Do you deal especially in gasoline? A. I do.

Q. How long have you handled gasoline? A. Almost forty years, since my connection with the organization.

Q. Have the use and demand for gasoline increased largely in the last few years, and if so, why? A. It has increased wonderfully. In 1900 less than eight million barrels were sold in the United States, and last year over eighty million.

1522 *William R. King, Direct*

Q. What has caused this increase in the consumption of gasoline? A. First there was the introduction of stationary gasoline engines, then automobiles, pleasure cars, trucks, launches, aeroplanes; mostly automobiles.

Q. What percentage of the gasoline which you sell to the consumer in your retail trade as near as you can estimate it is taken and used by automobiles? A. Ninety per cent.

Q. Prior to the use of gasoline in engines, and automobile engines particularly, how did the price
1523 of gasoline compare with the price of refined oil, water white oil, for instance? A. Well, for a great number of years it was lower than the price of refined oil.

Q. And was practically a drug on the market? A. Practically a drug on the market.

Q. In the refining of oil is it necessary to produce more or less of the lighter product which is generally called gasoline? A. At the present time?

Q. Yes, always; was more or less of it always produced? A. Always more or less was produced.

Q. But formerly there was no demand for it? A. No demand of any great amount.

1524 Q. Do you know whether it was in some respects a waste product? A. A great many times.

Q. Now, since the demand has increased how about the proportion of gasoline which they make out of oil in refining it? A. It has increased wonderfully.

Q. And have new methods have been devised? A. New methods have been devised of every description.

Q. To produce more gasoline? A. To produce more gasoline.

Q. State whether or not in the dispensing of gasoline and lighter oils to the public a special container

of some kind is necessary to hold the product while it is being dispensed? A. Absolutely necessary for safety and convenience and economy.

Q. Before the use of gasoline became so common what were the containers usually employed for this purpose to hold the lighter oils and dispense them? A. Wooden barrels, cans, any kind of an old tank, ordinarily known as a store tank; it was not a safety tank in any way.

Q. And later instead of wooden barrels what came in? A. Then the steel barrels came in as containers.

Q. And when gasoline came to be used largely and 1526
shipped do you know if there was any requirement compelling the shipment of it in steel barrels? A. Well, the railroad authorities compelled us to ship it in steel barrels instead of wooden barrels.

Q. What was the practice in those days as to the loaning of these containers, barrels, steel drums, to the small retailer to contain or hold the product while he was dispensing it to the trade? A. Ninety per cent they retained, either wood barrel or steel container.

Q. Under a loaning system? A. Yes.

Q. It has been testified here that that practice is still in vogue and that in some cases the steel drums 1527
are filled with the gasoline and if returned within a certain time, thirty days or so, that then they are given credit. What is the effect of that so far as compared with the loaning system? A. We do not sell the steel barrels.

Q. You loan them? A. We loan them all.

Q. And you want them back? A. We want them back. If they are not delivered after a certain length of time we will charge them.

Q. Does that billing system have the same effect as does the loaning system in reality? A. Do you mean billing the barrels?

Q. Yes? A. We have never billed steel barrels.

Q. But the companies that do bill them, does it amount to the same thing? A. It amounts to the same thing.

Q. The increased use of gasoline has caused what new container to be universally adopted as the proper facility or equipment for dispensing the gasoline to the public? A. An underground tank with a pump and the facilities with it.

Q. Is that now the universal method or practically the universal method of dispensing gasoline to the
1529 public? A. Practically the universal method. A few of the steel barrels are retained.

Q. What is the objection to the steel barrel as far as the dispensing is concerned? A. The storage is so small, and then you have to draw it off in some kind—either with cans, and so forth, and it is quite dangerous in some cases, you know, and they put in an iron pump in the steel barrel and that produced electricity that caused explosions on a number of occasions, to pump that out.

Q. It makes it dangerous? A. It is very dangerous.

Q. And you say particularly it does not give re-
1530 tailer sufficient storage? A. It does not give him sufficient storage.

Q. When this new facility or equipment came in use as the proper method of dispensing the gasoline to the public state whether or not the system of loaning which had been in vogue as to steel drums was continued as to this new equipment? A. It was.

Q. How long ago since these equipments as we have been calling them, curb pumps, began to be largely used? A. 1914 and 1915, about four or five years ago.

Q. How long has the system of loaning the equipments been in use? A. About four years.

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Q. Does your company practice this method of loaning such equipments to the operator? A. We do.

Q. Does your company engage in the marketing business to the consumer of its product? A. In some cases.

Q. What states do you market in to the consumer? A. In the six New England States, and New York State, seven states.

Q. Have you a registered trade-mark or brand under which you dispense your product to the public? A. We have.

1532

Q. What, if any, efforts have you made to make that trade-mark or brand of value to your business? A. By having a uniform quality, a good quality, and advertising and distribution through the long tank.

Q. Do you manufacture all of your gasoline which you sell? A. Not all of it.

Q. In case you purchase gasoline from others what, if anything, do you do in order to see that it is of as good a uniform quality as what you manufacture? A. We purchase it on specifications.

Q. Do you ever run it through your refinery? A. We do.

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Q. Do you do that to any great extent? A. Summer before last I ran over 500,000 barrels through our Buffalo refinery when I had to go out and buy it, at a very heavy loss.

Q. You bought it outside? A. I bought it outside. It was unfit for our trade.

Q. As a result of this care which you have taken and the advertising of your trade brand, has it become recognized as a good grade of gasoline through the territory where you market it under that trade name? A. It has.

Q. Do you regard that as a valuable business asset? A. Very valuable.

1534 *William R. King, Direct*

Q. In order to get it to the public under your trade name what, if anything, is customary to have upon the equipment through which it is dispensed, those pumping outfits? A. Do you mean in regard to these pumping outfits or our whole equipment?

Q. The whole equipment? A. We refine a large quantity ourselves in the refinery and we transport it either in bulk, boats or tank cars to what we call our distributing stations or storage plants, and those storage plants consist of warehouses, offices and storage tanks, equipments of tank wagons, both automobile
1535 and horse, horse drawn trucks or automobile trucks.

Q. And then for the dispensing of it what do you have? A. We have barrels, cans, small tanks.

Q. And what about these outfits, these curb outfits? A. Those outfits we consider part of our equipment. They are carried in our equipment as equipment.

Q. What would be the average cost of one of those stations which you established with tankage in order to supply the community? A. Do you mean curb pumps?

Q. No, I am speaking of the tankage? A. Of the ordinary distributing station?

1536 Q. Yes. A. They would vary according to the locality and the cost of property. They might cost $10,000 and they might cost $100,000 or $200,000, and some $500,000.

Q. And then as part of the equipment you would have a certain number of tank wagons? A. A certain number of tank wagons, yes, sir.

Q. Take a certain amount of storage, a certain amount of barrels, how many tank wagons would you have then in proportion to the barrels as a rule? A. Well, we figure an output of about three thousand barrels, a tank wagon for each three thousand barrels output.

Q. Then would you figure on how many pumping outfits you would probably require? A. Yes.

Q. About how many would you have for each tank wagon on an average? A. Well, it would depend on the size of the tanks a good deal; it depends upon the locality, upon the consumption in that district. You could hardly answer that truthfully or definitely.

Q. It is pretty hard to make an average? A. Very hard.

Q. Which costs the most, the tank wagon equipment or the pumping outfit equipment? A. The tank wagon equipment. 1538

Q. Any large proportion more? A. Very much more so. A tank wagon, an automobile tank wagon costs between $4,000 and $5,000, sometimes over that.

Q. And what is the average cost of these little curb pump outfits that you place? A. The one gallon formerly cost from $100 to $250 and the five gallon one now costs about $300 to $350 maximum.

Q. What effect has the establishing of these curb stations for the sale of gasoline and the tankage which they afford upon the cost of your distributing and supplying them through your tank wagons? A. It reduces the cost very materially.

Q. Suppose you had a customer, a retailer, a store 1539 of some kind who is buying from you in a steel drum; what would be the capacity, what is the ordinary capacity of a steel drum? A. About fifty-four to fifty-five gallons.

Q. Now, if he had sufficient trade there would it be possible for you to install a proper pump outfit with a sufficiently large tank so as to save so much expense in delivery? A. It would.

Q. Would that be a profitable investment for you instead of allowing him to keep the drum? A. It would.

1540

Q. And if he had a little old tank such as you have testified they use, which did not furnish an adequate storage, would it be profitable to you in the way of economy and the delivery, to furnish him a proper outfit with sufficient storage? A. Decidedly so.

Q. That would cause you less trips to supply him? A. Yes.

Q. What effect has this system of leasing and loaning these curb outfits had upon the number of such stations installed, especially in the rural communities? A. I hardly understand that question.

1541

(The question was then read as above recorded.)

The Witness: I do not understand that.

Q. State whether or not this leasing and loaning of curb pump or outfits has increased or decreased since the installation of such equipment? A. Well, that I cannot get, because—

Q. In other words has it caused the installation of more outfits than otherwise would have been installed? A. Oh, yes, decidedly so.

Q. Yes, that is what I thought. A. Yes.

Q. Does the leasing or loaning of such an outfit
1542 and establishing in that way a station for the sale of your product in the conduct of your business depend entirely on whether or not there is competition in the community? A. We pay no attention to competition.

Q. What is your method? A. Our method is to get our gasoline to the public in the most economical way possible.

Q. And do you lease and loan such equipment in territory where at the time there is no competition? A. Many a time we have leased and loaned it where

there was nobody else selling gasoline in this district but ourselves.

Q. Has this increase in the use of gasoline caused a demand for it in outlying districts? A. A wonderful demand.

Q. Where there was no supply? A. Where there was no supply.

Q. Do you have applications from communities or from persons in certain communities, especially outlying rural districts, to put in stations of this kind? A. We do.

Q. And what do you do in a case of that kind? 1544
A. Investigate whether there is sufficient business at the present time or possibly in the future which we have to look out for, for the wonderful increase in the rapid use of this thing.

Q. And then if you decide there is going to be sufficient business there what about the location then for it, do you consider that? A. We consider that very decidedly.

Q. What do you say as to whether or not this loaning of such equipment has caused more of them to be installed than is fairly necessary to accommodate the communities and to furnish the necessary storage for the products? A. I do not think there is sufficient storage to accommodate the public. 1545

Q. And is the demand still increasing? A. Rapidly, very greatly.

Q. What causes it to increase? A. New automobiles and the introduction of trucks which consume three times as much as the ordinary pleasure car.

Q. I am not sure if I asked you whether the installation of these—I asked you about a particular case, but generally whether the installation of these equipments through the rural districts has been profitable in the way of decreasing the expenses of sup-

plying the gasoline? A. It has. I can make one delivery of ten to twenty barrels where formerly I had to make ten to twenty deliveries and sometimes more.

Q. It has been testified to here that garages and other retailers of gasoline with a trade name or sign over the equipment, nevertheless buy and sell through that equipment other gasoline than the kind they are advertising. What do you say as to that? A. Oh, it is very rarely the case.

Q. If you knew that was being done in a case of your equipments or where your sign was used would
1547 you interfere? A. Do you mean those of loaned equipments or a garage we were furnishing?

Q. Any place where your sign was up? A. We would remove our sign immediately from a garage where they owned their own tank, and if it was our own equipment loaned we would remove our equipment.

Q. There was testimony here, I think by Mr. Jones, which applied more particularly to North Carolina, in which he stated that the percentage of loaned equipment was greater in the cities than in the rural districts. What is the fact in your district as to that? A. Well, in certain districts the percentage where
1548 they own their own equipment is much greater. Take for instance in the metropolitan district of New York, I do not know of one single case where we have loaned a tank in the City of New York. Outside of this, yes.

Q. When you get outside— A. Yes. You cannot have curb pumps in New York. The ordinance will not allow it.

Q. The streets are so crowded— A. Your ordinance does not allow it.

Q. The autos could not stop? A. The city ordinance would not allow you.

Q. Well, that is the fact, the streets are so crowded they could not stop? A. Yes.

Q. But when you get outside the cities into Westchester County and the surrounding territory you lease them? A. Yes.

Q. And in your territory the leasing and loaning is a greater percentage in the rural districts? A. In some of the cities outside of New York they do.

Q. Where they have curb pump methods in the city? A. Yes, where it is not congested like they are in New York and where the ordinance does not prohibit it. 1550

Q. Do you sell gasoline in the city here to the garages and other retailers? A. We do.

Q. Do they keep your sign over their equipment? A. They do, if they sell our gasoline.

Q. What do you say as to whether or not such garages usually handle and continue to handle one make of gasoline? A. In the majority of cases they handle one grade of gasoline.

Q. Do you supply garages here that own their own equipments, that you have been supplying for years? A. We do.

Q. And they sell it under your name? A. They do. 1551

Q. There has been testimony that a great many of these loaned equipments were put in unnecessarily and at places where they were unprofitable. What do you say as to that in your territory? A. Very rarely.

Q. What percentage of the installations you have made would you say have had to be removed, of the loaned equipment? A. Less than one per cent.

Q. What do you say as to the effect of this method or practice of loaning equipment upon competition in the sale of gasoline? A. It has increased it.

Q. Are there more companies operating now in your territory than there were a few years ago? A. I counted them up in the end of 1915 and there were 113. The last count we took of them in this year was 144.

Q. Has that increase been of large companies or of local companies operating in particular localities? A. Both; in numbers, more smaller companies; in volume, the larger companies.

Mr. Speer: For the present I can think of nothing further.

553

CROSS-EXAMINATION by Mr. Burdeau:

Q. Did I understand you to say that competition has largely increased in the territories served by the Standard Oil Company of New York? A. Yes.

Q. And you enumerated the number of companies now engaged in business in comparison with the number at some former period? A. 1915.

Q. Did I understand you to say that you believed that this increase in competition was in a way due to the use of the pumps and tanks? A. Partly.

554 Q. Will you explain in what way the use of pumps and tanks has contributed to this increase of competition? A. We go in a district to put in a tank or pump and to develop the business, and we did develop the business. Somebody else may have been there or we may have been alone. And in nine times out of ten somebody else would follow us with a tank and pump in close proximity.

Q. But that does not produce a new competitor. The competitor already existed, is not that a fact? A. Sometimes it is a new competitor.

Q. Can you give me any instance in which a new competitor has appeared on the scene to meet you

with a tank and pump proposition? A. A new competitor, yes.

Q. What? A. The Sinclair Oil Company to a great extent.

Q. That is a very large and powerful company? A. It is now.

Q. Do you attribute its existence to the use of the pump and tank proposition? A. Not entirely, no.

Q. Do you attribute its existence at all to the use of the pump and tank proposition? A. No.

Q. Can you name any company whose existence 1556
you do attribute to the use of the pump and tank proposition? A. No.

Q. In what respect then has the use of the pump and tank proposition contributed to the increase in the number of companies engaged in your business? A. When you develop a business competitors of every description come in, new ones and old ones.

Q. Now, you say you know when the practice was adopted by your company of leasing and loaning pumps? A. Yes.

Q. When was that? A. In about 1914, 1915, four to five years ago.

Q. And your company does business in the New 1557
England States and in New York? A. Yes.

Q. Do you remember what companies were also doing business in New England and in New York in 1914 or 1915? A. Yes.

Q. Will you please enumerate them? A. The large companies?

Q. Yes, the principal competitors of the Standard Oil of New York? A. The Gulf, the Texas—those are the only large companies in 1914.

Q. Which company, if you know, first adopted the practice of leasing or loaning pumps? A. I do not know.

1558 *William R. King, Cross*

Q. Do you recall what reasons prompted the Standard Oil of New York to adopt this practice? A. Yes.

Q. Will you please give them? A. We had reports from our field all over that some of the small jobbers were giving pumps and tanks away and it was simply history repeating itself, when the tank wagon was introduced for kerosene oil, there were tanks loaned and given away, innumerable ones. The only way they could get them in was to do that way.

Q. Your reason as I understand your answer was
1559 that you had heard in 1914 and 1915 that certain small jobbers were giving away pumps and tanks? A. Yes, and some of the larger ones.

Q. And that was making inroads on the business of the Standard Oil Company of New York? A. No, it took some of the trade.

Q. And giving away those pumps and tanks did take away some of your customers? A. Oh, sometimes there has been—

Q. You adopted this practice so to speak to fight the devil with fire, is not that so? A. No, the necessities of the trade were such that the increased business demanded some outlet for our naphthas.

1560 Q. The necessities of the trade demanded some increased output? A. Increased outlet for the public, the business increased so rapidly that we had to find some way of getting our napthas to the public.

Q. How did this great extension in demand manifest itself if there were not already adequate facilities to meet the public demand? A. The public could not be furnished. We have had applications many a time where they could not get the napthas they wanted when they were out.

Q. The demand had to show itself in the beginning, did it not? A. It did.

Q. In what way was that demand met? How did you realize the existence of that demand, if there were not adequate facilities for distribution then? A. We had complaints that people could not get gasoline.

Q. From what source did those complaints originate? A. From individuals.

Q. They complained that there were not enough service stations? A. Not enough places where they could get a supply of gasoline.

Q. You are engaged in the retail business? A. Yes.

Q. To what extent are you engaged in the retail 1562
business? A. Quite a large percentage we deliver to parties owning their own garages.

Q. Is it a fair question for me to ask you the total volume of gasoline trade last year of the Standard Oil Company of New York? A. I do not think I ought to answer that.

Q. You regard that as a business secret? A. Yes.

Q. Will you give me the percentage if you can of your purely private distribution to the individual owner of an automobile, what percentage of your business?

Mr. Speer: I think he gave it as about 1563
ninety per cent.

The Witness: No, I said that was the automobile. He wants to know what I deliver to private garages.

By Mr. Burdeau:

Q. To the private owner, the owner of a private garage, not in business? A. I should judge about ten per cent.

Q. What proportion of your business consists of sales to garage owners, I mean by that public garage owners and curb pump men and other retail dealers?

A. I could not quite answer that. I can give you the percentage of what we do through the long tanks.

Q. Well, if you cannot give me the answer to the question I asked, I will let you give me the answer that you want to give me— A. I do not want to give you any answer, only I want to see whether this is what you want.

Q. Well, you suggested it, Mr. King. A. Yes.

Q. What percentage of your business consists of sales to lesses of your equipment? A. In 1916, 48.9 per cent of our total business and about 68 per cent
565 of the automobile trade.

Q. Is economy a consideration with your company in the use of this tank and pump leasing? A. It is.

Q. Do you regard it as an economical means of distributing your product? A. I do.

Q. In what way is it economical? A. Because I can have sufficient storage so that I can keep the trade supplied in that locality and otherwise I would have possibly to make ten or twenty deliveries where I can make one delivery with a ten or twenty barrel storage tank.

Q. That is all true also of the case where a man owns his own pump and tank, is it not? A. Yes.

56 Q. And you have in the case of the leased pump and tank an investment of some three or four hundred dollars? A. Yes.

Q. And so as between the owned and leased equipments you are under a greater expense with regard to the leased equipment? A. When the party owns the equipment they put in very often meager facilities, not sufficient to keep the trade supplied.

Q. I am assuming for the purpose of my question that one man owns a five hundred gallon storage tank and your lessee has a five hundred gallon storage tank; it is cheaper for you to sell to the man who owns

in that case than to the man who leases from you, is it not? A. No cheaper, no.

Q. The actual delivery is the same? A. Yes.

Q. The cost of delivery is the same? A. The cost of delivery is the same.

Q. Absolutely the same? A. Absolutely the same.

Q. But in the case of the leased equipment you have the investment of some five or six hundred dollars? A. Yes.

Q. For which there is a profitable return? A. Yes.

Q. You said that there are practically no leased equipments in New York City? A. Practically no 1568
leased equipments.

Q. And you are satisfied with your share of the business here in New York City? A. I am—not.

Q. Do you believe you could get a larger share of business in New York City if you were permitted to make use of the loan and lease device? A. I think we could.

Q. Now, does your company sell its product in bulk to jobbers? A. Very little.

Q. It does in some cases? A. Very rare.

Q. Well, it has, has it not? A. Only in cases of necessity, to help them out or something like that.

Q. In such cases has there been any restriction as 1569
to the use of a separate brand or name in the resale of that product? A. Do you mean where they use our brand or not?

Q. Yes. A. We never allow them to use our brand, we never sell our brand of gasoline to them.

Q. But the same brand has been distributed through jobbers under a different name? A. So rare—it is very rare.

Q. But it has happened? A. Very rare.

Q. You are familiar generally with the distribution of gasoline, are you not? A. I am.

Q. And you know that most refiners do sell in bulk to jobbers? A. We do not.

Q. I say you know as a matter of fact that most refiners do sell in bulk to jobbers? A. Yes.

Q. And that the jobbers in turn resell under a different brand? A. That I do not know, no.

Q. Don't you know, Mr. King, as a matter of business practice, that jobbers who buy from refiners use their own brand in distributing the product? A. In a great many cases I understand they have, but I cannot speak as an actual fact. We do not manufac-
1571 ture enough that we have any to sell. We have to buy.

Q. Do you know Mr. Seth C. Drake of the Indiana Standard Oil Company? A. I do.

Q. How long have you know him? A. I do not think over three or four or five years.

Q. You became acquainted with him in business, I presume? A. Yes. I know his father very well.

Q. Do you know his position with the Indiana Standard Oil Company? A. I believe he is general manager of the sales department.

Q. Do you regard him as a good merchant? A. I do not think that is a good question for me to answer.

Q. Well, I am asking— A. Because I do not like
1572 to criticize anybody that is in the oil business. My idea of a merchant might be different from some of the others.

Q. It is perfectly fair for me to ask you—

Mr. Speer: I object to it as absolutely immaterial.

A. I would not like to do it because I might give you an opinion that would be detrimental to Mr. Drake.

Mr. Hayes: I really think that all the colloquy after the question should be stricken out.

Mr. Burdeau: I am satisfied my question 1573
was perfectly competent.

Mr. Hayes: The question was competent, but I think the rest should go out. Do I understand that is going to remain in?

Mr. Burdeau: Yes, everything is going to remain in.

Examiner Dunham: I stated when we began this investigation that I doubted very seriously if the Examiner had the right or would do right to refuse to permit a witness to answer any question what was asked him. I think the safer plan is to let the question be answered and let the objection be noted. But 1574
I think with this witness that modesty would suggest that he had a perfect right not to answer that question and criticize a competitor. However, if the question is insisted upon I shall rule that he may answer it. You object to it?

Mr. Hayes: No, I do not object.

Examiner Dunham: But I am very much inclined to think a man ought not to be asked to partially criticize a competitor.

Mr. Hayes: I do not object to the question so far as I am concerned. I do not think it was a proper question, but there was no answer 1575
made to the question and all ths stuff that Mr. King said afterwards and which was not responsive to the question I think should be stricken out.

Examiner Dunham: Would you gentlemen consent that it be stricken out?

Mr. Burdeau: No, for this reason. I think my question is entirely competent, and nine-tenths of the evidence in this case consists of opinions presumably from experts in the oil business. It is always competent to ask one

expert, as I believe Mr. King is, whether or not he regards another as expert in the business, for the purpose of contrasting their separate opinions and I would like everything in this record.

By Mr. Burdeau:

Q. Now, I will read—

Mr. Hayes: No objection to the question. I think, however, that there should be a responsive answer, if any at all or "I do not care
1577 to answer it." All that Mr. King said afterwards was not in response to the question at all.

Mr. Speer: In this respect I want to say as a further objection that we have not sought to prove by expert evidence whether or not this was a good business practice, as we have been objecting to that kind of testimony, and that for that reason an examination of Mr. King as to whether some other man may be an expert or not is entirely incompetent and immaterial.

Mr. Burdeau: I only venture to say that if
1578 you can point to one question out of ten that Mr. King was asked on your direct that is not calling for an opinion I will withdraw it.

Examiner Dunham: Will you read the last question?

(The previous question and answer were then read as above recorded.)

Examiner Dunham: Do you consent to striking it out?

Mr. Burdeau: No, I want it to remain.

Q. I am now producing from the official files of the Federal Trade Commission against Standard Oil Company from the official files of the Federal Trade

Commission a notice of motion together with certain affidavits filed in the case of the Federal Trade Commission against Standard Oil Company of Indiana, Docket 85, and I read to the witness the following on page three of an affidavit made by Mr. Seth C. Drake, subscribed and sworn to on the 13th day of September, 1919, before Marie C. Woolley, notary public—

Mr. Speer: Before that is read into the record we wish to object—

Mr. Burdeau: Just one minute. I think any attorney has the right to finish his question before an objection is received. 1580

Examiner Dunham: Just wait a moment. Let us have this proceed in as orderly a way as possible. When one counsel has the floor let him finish and then let the objections go in. Now, what have you to say?

Mr. Speer: But, may it please the Examiner, I am objecting to his reading here into this testimony the affidavit which has been made by somebody somewhere in reference to this matter and the witness has not been called and no opportunity given to cross-examine him, and it is endeavoring to get into the record here affidavits made by somebody else applying on this question, and I object to it as incompetent, immaterial and irrelevant and that it should not be allowed to be read into the record. 1581

Mr. Burdeau: I have not finished my question. If I read into the record anything—

Examiner Dunham: Wait a moment. Suppose the stenographer suspends and then we will let it be read and see if it is to go in.

Mr. Burdeau: My point is if I ask an objectionable question and your Honor entertains the objection and sustains it, you can strike out

1582 *William R. King, Cross*

the question and then it is out of the record, but I insist that in all courtesy I am entitled to frame my question the way I want to and complete it the way I want to.

Examiner Dunham: I think so.

Mr. Burdeau: And I want the question in so that any objection to my question will appear to the question as a whole.

Examiner Dunham: You may proceed.

Mr. Burdeau: Read the question as far as I had gone.

1583 (The question was then read as above recorded.)

Q. I now complete my question by reading what I was about to read.

Mr. Speer: Note the objection.

Q. "Affiant further says that he has been connected with the sales department of respondent for many years last past and was so connected with it when the practice of loaning and leasing pumps and tanks to customers was inaugurated and said practice of leasing and loaning pumps and tanks for a nominal consideration or free of charge was inaugu-
1584 rated by the competitors of the respondent and respondent thereafter adopted such practice solely as a matter of self defense to meet in good faith competition so tendered to it by its competitors; that such practice has been and is contrary to the judgment of the sales managers of respondent and is in their judgment bad merchandising." Now, do you agree or disagree with the opinion expressed in that affidavit, that it is bad merchandising? A. No, sir—

Mr. Speer: I want to object to it as incompetent, immaterial and irrelevant.

1645

Examiner Dunham: Let the stenographer note the objection with the reasons that he may assign.

Mr. Hayes: I think that in order to have the witness properly answer the question the entire affidavit of Mr. Drake should be presented to him and read to him.

Mr. Burdeau: I have not the slightest objection, if counsel wants the entire affidavit read, Mr. King can read it. (Handing paper to witness.) Please note that the entire affidavit of Seth C. Drake is tendered to the witness King.

1646

By Examiner Dunham:

Q. Does the witness wish to read the entire affidavit before he answers? A. I am perfectly willing to answer it on the part of the affidavit that the learned counsel gave me.

Q. You may answer the question.

Mr. Hayes: I will withdraw my suggestion.

The Witness: Will you kindly put that question to me again.

1647

By Mr. Burdeau:

Q. Boiled down I will repeat it in this form: Do you agree with the statement contained in the affidavit of Mr. Seth C. Drake in substance to the effect that the practice of leasing and loaning tanks and pumps for a nominal consideration to retail dealers is bad merchandising? A. No, sir, I do not think it is. I think it is good merchandising.

1588 *William R. King, Cross*

By Mr. Speer:

Q. He asked you if you agreed with his statement? A. No, I do not agree with it.

By Mr. Burdeau:

Q. What do you claim to be the merit of the lease and loan plan?

Mr. Speer: We object to it as incompetent, irrelevant and immaterial. It is not a question here of merit. It is a question of its
1589 illegality.

A. It gives us an excellent outlet for our product to the public.

Q. Mr. King, is not the owner of a tank and pumping equipment just as good an outlet to the public as the lessee of one of your equipments? A. The trouble is the owner will not put in the requisite storage. He economizes in every possible way and he will put in small storage and we cannot keep him fully supplied.

Q. Do you believe it is good merchandising to your company to finance the retail dealer and distributor of your product?

1590 Mr. Speer: We object to that as incompetent and as not being the fact.

Examiner Dunham: You may answer that question, if you can.

A. I think your question is such—

Mr. Nesbitt: I think he ought to reframe that question. It contains an imputation that his company is engaged in the business of financing the retailer. I think he can get at what he really wants without having that imputation in his question.

Q. When your company leases or loans a pump and tank to a retailer dealer for a nominal consideration you are financing that dealer to the extent of the value of that equipment, are you not? A. I am loaning him that equipment.

Q. You are financing him to the extent of the value of that equipment, are you not? A. No, I have him as a sort of an agent of ours, that is, he is really sort of an agent.

Q. You regard him not as an independent distributor? A. Oh, yes, I regard him as an independent distributor, except as far as what goes through that 1592
tank of mine.

Q. An agent is not an independent distributor, is he? A. Not unless he designates what his powers are.

Q. The agent is simply an *alter ego* of your company? A. Some agents with their duties designated can only do certain things.

Q. You deny then that you are financing the retail distributor to the extent of the value of the equipment when you loan it to him for a nominal consideration.

Mr. Speer: I object to it as a mere play on words.

1593

A. I put in a tank worth from $200 to $400 for the storage of our product. That is how it is. Now, if—that is all I do.

Q. And you can sell gasoline at the same price, cost of delivery and so forth, to the man who owns his own equipment? A. If he has the equipment and is willing to put in sufficient equipment, but he is not. We have never yet found but very few cases where he would put in sufficient equipment unless in large cities.

Q. You sell to every owner who will buy from you? A. Any one who wants to buy from us.

1594 *William R. King, Re-direct*

Q. Have you ever discriminated against a man who owned his own pump and tank because it was not big enough to suit your purposes? A. No.

Q. You are glad to get any one for a customer who owns his own pump and tank? A. We are glad to get any trade, but that is no reason why we should not get another one, where we can sell more through loaning a tank.

Mr. Burdeau: That is all.

1595 *RE-DIRECT EXAMINATION by Mr. Speer:*

Q. Mr. King, especially in the rural districts where the amount which may be sold through the equipment is uncertain, not only on account of present demand but on account of the danger of future competition, do you find that the operator is unwilling to go to the expense of putting in adequate equipment? A. In a great many cases.

Q. As a result of the universal ownership of automobiles and often by persons of limited means who have small and inexpensive garages, are there many private garages of that character that do not place as a part of their garage a proper tank and pump for the
1596 storage of the gasoline which they use? A. A great number. I did it myself. In the country I had a garage and kept my cars in it and sent them out to get their gasoline.

Q. They rely upon what source of supply in order to prevent the necessity for keeping a store or stock themselves? A. Curb pumps, service stations or a garage.

Q. Do you loan your equipment to private garages? A. No, sir.

Q. You were asked whether or not jobbers did not buy gasoline in the market and then sell it under a

brand of their own, and I believe you answered that they probably did. In that case if they have a brand which they are holding out to the public and seeking to establish a business under that brand, what do you say as to whether or not in purchasing the gasoline they require it to conform to certain specifications so that the product will not ruin the reputation of their brand? A. I could not answer that.

Q. You do not know? A. No.

Q. Do you have service stations as has been testified to here which are built and a number of pumps put in them to which the public are invited to come to 1598 get their supply of gasoline? A. No.

Q. That method of distribution is in use by some companies? A. Quite a number.

Q. Why do you not adopt that method? A. It is too expensive.

Q. Would that be a profitable method in small communities? A. Not at all.

Mr. Zechiel: On this question, you have the same general practice of buying your gasoline and pumps and installation and all that?

Mr. Speer: I think it might be better to ask him. I do not know whether it would correspond with all that has been said by other 1599 witnesses or not.

By Mr. Zechiel:

Q. You heard Mr. Young testify as to how the gasoline is bought by the Standard Oil Company of New Jersey and how it conducts its business in selling and distributing that product. Is the system of the Standard Oil of New York the same as that? A. Yes, somewhat similar.

Q. You say somewhat similar. In what respect is it different? A. I cannot pick out anything differ-

ent in any great degree. It is about the same—do you mean in handling it?

Q. Yes, your method of buying your gasoline or crude oil and refining it. A. It is about the same.

Q. And then selling it your gasoline products? A. It is about the same.

Q. You also heard Mr. Young testify with respect to the purchase and distribution of the pumps. Is your method the same, the same in that respect, also? A. Well, he said he purchased all of his from Gilbert & Barker. We do not.

1601 Q. Outside of that fact and the mere matter of the place where you purchase is there any difference in your practice from his? A. I do not think he testified in regard to purchase of tanks and pumps.

Q. He testified as to where he purchased them, how he distributed them, how he had them sent to him in carload lots. A. We have then in carload lots, yes.

Q. You do not remember his testimony. A. I did not hear him testify to that. Mr. Gatchell testified to that, but I do not think Mr. Young testified to that.

Q. Did you hear Mr. Gatchell's testimony yesterday? A. Yes.

Q. Is your testimony the same as Mr. Gatchell's
1602 in that respect? A. He said he shipped them sometimes over the line into other states.

Q. Yes. A. I do not know of any case where we shipped any over the line.

Q. You do not know that you occasionally shipped them over a line? A. I do not know that we have, because we have so many storages for these tanks that we only distribute in the locality within convenient driving distance, either auto or horse drawn, we would not take them across the line. I do not think I know of any case or ever heard of any case where we took them across the line. And we keep them in these vari-

ous warehouses where we have to distribute just in that close proximity.

Q. And it is true also, is it, of the questions that Mr. Hayes asked Mr. Gatchell yesterday with respect to what it takes to make up one of these equipments and how it is installed and so forth? A. Yes, they come in units and they have to be all put together—

Q. Practically the same as he testified? A. Yes, practically the same as he testified. He left out about the globe or did not testify to the globe. It comes from another party and Mr. Young put that in.

Q. Do you install all your equipments yourself? 1604
A. Yes.

Mr. Zechiel: I think that practically covers it.

By Mr. Speer:

Q. In the sale of your gasoline to the consumers you have separate sales organizations in the different states? A. We do.

Q. And that sales organization only sells in that particular state? A. In that particular state.

Q. And the oil stored in that state is sold only in that state? A. In that state.

Q. And that business is reported in the state? A. 1605
Yes.

Q. Each state is kept separate? A. Yes.

Q. And if there are any sales or transporting over the line it is without your knowledge or against your business practice? A. Yes, against our business practice.

Q. The same is true of the placing of the pumps? A. The same.

1606 *William R. King, Re-direct*

By Mr. Zechiel:

Q. I want to ask Mr. King just a question or two on cross-examination. Mr. King, with respect to this leasing and loaning of oil tanks and pumps what is your theory about it, is it used as a method of securing gallonage distribution, or is it used as a method of securing geographical distribution? A. Well, that is a rather difficult question, because I could not see how it could be used geographically, you know, because you would not put in a station unless you had an idea there
1607 was sufficient demand for it, and if there is a sufficient demand for a place then it would be a question of gallonage or—

Q. Then in each case it would be a question of gallonage? A. Well, your question is rather—I hardly understand it, you know, whether geographically or for gallonage.

Q. When you began the practice of leasing and loaning what was the object you had in mind that you wished to accomplish? A. I wished to get our gasoline to the public because there were not sufficient service stations or garages to serve the public and complaints came in from all over to us, why didn't we have
1608 facilities so that the automobilists could get their gasoline when they went out. They complained they could go out about twenty miles and would have to come back. They claimed they could not run truck, quite a number of people came to me, because they could not get a supply from us; and we got information from our fields that the farmers with their market wagons could not get a supply to come into market and return where the distance was any great amount, and with increasing business we had to put in facilities to get the gasoline to the consumer.

Q. That was true then you think both geographically, the territorial extent of the distribution, and also the gallonage in any particular locality? A. Well, I should say you might comprise the two together, but I cannot see how geographically has anything to do with it, to get it to the public.

Q. Well, here is John Jones who lives out here in a small community in New Hampshire; no pumps there at all. Do I understand it was part of your system and plan to go there into that community and put in a pump? A. Yes.

Q. In order to supply them? A. Yes. 1610

Q. Now, suppose in the same locality after several years there was a supply but an insufficient supply; you also placed some of those oil pumps and tanks equipments in order to increase the gallonage? A. Yes.

Q. Then you had a double-barreled motive, did you not, to spread out the area over which you distributed your gasoline, as well as the quantity in any particular area, is that right? A. Oh, yes, that is right.

Q. Then it was most geographical or territorial extent and quantity? A. Yes.

Q. Is that the plan that you had in mind, is that the thing that started you in the use of this system of distributing your products, leasing and loaning oil 1611 tanks and pumps? A. I do not think that is the kind of question to try to force me to say I had some idea which never appeared in my own mind at the time we did it.

Q. You did not think about it at all, then? A. No.

Q. Then what was it— A. We wanted to get our gasoline to the public.

Q. All you had in mind then was merely distribution of your product, gallonage distribution? A. Distribution and accommodation of the public.

1612 *William R. King, Re-direct*

Q. And you also had accommodation of the public in mind? A. Yes, we decidedly did.

Q. Have you always followed that method of distributing in order to get gallonage distribution and also to accommodate the public? A. We have.

Q. Have you ever installed an oil pump and tank under one of these leases because the customer in a particular locality refused to buy your gasoline from you, and you installed it say across the street or within a half a block of that equipment? A. I have never known of a case myself.

1613 Q. You do not know whether your company ever did that at all or not? A. I do not. To my knowledge, no.

Q. And the company might have done it a great many times, might it not? A. Very rarely, unless I would know.

Q. It is not impossible, though, is it? A. Oh, nothing is impossible in this world.

Q. So that it may be true that your company has frequently without your knowledge at all installed oil tanks and pumps under leasing contracts because the agent in that particular locality was unable to sell to the individual to whom he wished to sell A. That

1614 is a supposititious question—

Q. I am asking you whether you know? A. I do not know, no. Nobody could know that.

Q. That is all right, if you do not know? A. No.

Q. Are the storage facilities sufficient here in the city? A. In the City of New York?

Q. Yes? A. No, sir.

Q. Insufficient? A. Insufficient.

Q. To what is that due? A. They have not sufficient storage, due a great deal to the lack of the

ordinances is not giving them permits to carry sufficient. We have to take it out Sundays and nights to get them supplied.

Q. If your ordinances here permitted you to have more gallonage in storage do you think that that would adjust itself very readily? A. It would except for the great congestion in New York City; it would be almost impossible to have the storage and to have the automobiles stop. It would congest traffic so I do not think they ever could have storage enough in New York City.

Q. I understand you to testify that there are no 1616
leased equipments at all? A. Not in the City of New York that I know of. Outside of the City of New York, in Greater New York, yes, but I mean in the metropolitan districts of the City of New York, not that I know of at the present time.

Q. And it is your opinion that leasing of equipment is quite as common in the rural territories where there is no great competition as it is in the areas where there is a large competition? A. Yes, I believe it is.

Q. Is it more common in those areas? A. More common?

Q. Yes. A. We put in equipment any place where 1617
the amount of business has required it, you know.

Q. I am asking generally about installations.? A. I think you will find the numbers of them are much greater in the rural districts than in any of the cities.

Q. That is the percentage number you are speaking of now? A. Yes.

Q. And not the actual number? A. The actual numbers of the pumps and tanks.

Q. I am speaking of percentage, the number, comparatively? A. Comparatively the total?

1618 *William R. King, Re-direct*

Q. Yes. A. The percentage is greater in the rural districts.

Q. And in the less competitive areas greater than in the highly competitive areas? A. That I would not say.

Q. Do you think it would be the contrary? A. We pay no attention as to competition. It is a question that we want to get our product out.

Q. I understand you do not, but you know the competitive areas, as a matter of fact, do you not? You know where they are. A. Do I know where they
1619 are.

Q. Yes, you know where they are. A. Yes, I decidedly know.

Q. And you also know where you have installed your pumps under lease agreements? A. Yes.

Q. Now, you have both of those. Is it a fact that there is a greater percentage of installation in the highly competitive area or the less competitive areas as far as your company is concerned? A. There are so few points but what the competition is so severe that I can hardly answer your question.

Q. Do you mean competition is practically uniform all over your territory? A. Yes.

1620 Q. You have practically no distribution except it is under competition? A. None, except in some of the mountainous districts for a short time there is but they follow us in a few days or a few weeks, with somebody else and they get in there.

Q. Do you think the use of the curbstone pump, this leased pump, tends to protect the public as to the quality of the gasoline that the public can secure? A. I do.

Q. How is that effected? A. Simply that we have our trade-mark brand over those that we lease and it

is absolutely necessary to protect our trade-mark brand. There is no other grade of gasoline goes through that tank. They can have as many other tanks on their premises as they want.

Q. Do you think that laws requiring the use of marks on pumps and tanks would be easily accomplished?

Mr. Speer: I object to that—

A. I couldn't say what would go through the heads of our legislators, you know.

Mr. Speer: I object to the question as incompetent and immaterial. 1622

Examiner Dunham: Now, you can answer as elaborately as you wish.

The Witness: You know we have a very valuable trade-mark registered in Washington and I think that they require us that to protect your trade-mark you shall have some kind of a receptacle with the name on the outside designating the name of your trade-mark brand and registered in the Patent Office in Washington, and therefore we loan the tank and put our trade-mark brand on it, and I think it is absolutely necessary to protect our trade-mark brand to have that sign of 1623
ours on it.

Q. If you would answer my question—just read the question.

(The question was read as above recorded):

A. I could not say.

Q. You do not think that would be a feasible way to protect the public, by passing laws requiring people who dispense gasoline to use signs on their pumps and follow the signs? A. What would you have on the sign, the same as we have?

Q. The same as you have, exactly? A. I do not think it would be a bad practice at all.

Q. Don't you think it would accomplish practically all that needs to be accomplished along that line, to have it required? A. No.

Q. Do you think in spite of a law requiring that to be done you would still need your leasing and loaning system to make it efficacious? A. I think it would.

Q. Do you sell your equipment as well as lease and loan them? A. We have no organization for selling.

1625 Q. You do not try to sell them at all? A. If they want to purchase them we sell them.

Q. But you do not make any effort along that line? A. Not any concerted effort.

Q. I did not quite grasp why you say that the use of the lease or loan system tends to develop demand for gasoline products. I so understood you to testify on your direct-examination? A. Yes.

Q. How is that? A. Well, if you have a pump and a tank in any locality people will come to that pump and tank. If you do not have it they will not go to it. Just like you have a drug store on the corner. You may go into it for many little articles but you would
1626 not if you had to walk ten blocks for them. Now, where a pump and tank are in close proximity to your place you will patronize that pump and tank.

Q. Then you did not mean to testify that it increased demand for the product but merely increased the business of the garage man who had the installation? A. Oh, no, it increases the demand for it.

Q. Now, I do not understand that. A. For the simple reason if a man finds he cannot get his gasoline, in the old days he would have to drive twenty or thirty or forty miles, he would not buy the automobile nor would he put on a truck, for the simple reason they

refused to put trucks on until they could be convinced they could get sufficient supply and not long distances apart and that has increased the trucks, which is the greatest business and is going to be the greatest business in the future for these facilities which have been put in by the various companies, as they could be certain of getting their supplies.

Q. Then you think this business of dispensing gasoline has not followed the automobile industry but has pushed it? A. No, it has not. It has not pushed it but it has helped it to a great degree.

Q. Has it followed according to the demand or has 1628
it stimulated the demand in your opinion? A. For automobiles?

Q. Yes. A. I think it has stimulated the demand for automobiles.

Q. You think your method of distribution has stimulated the demand for automobiles and also for trucks and other gasoline users? A. Yes, and I think if you had not these facilities off the main road and so forth that there would not be room enough on the surface of the main road for the automobiles and trucks to run on, while the installation of these pumps off from the main road and on the by road where they can get them has helped the congestion of traffic. 1629
Otherwise I do not think there would be room enough on the main highways for the automobiles and trucks to traverse.

Q. That is you mean to say that if they had had to get all their gasoline on the main highways there would not be room enough? A. Yes.

Q. That is the reason you put your pumps on the by ways? A. We put them everywhere, highways and by ways. We put them indiscriminately.

Q. Do you think that that placing of them on the by ways drew the customers there? A. Yes, many

a man wants to go off on the highways and by ways in traveling and another influence, farmers come from different localities and merchants in making deliveries have to go off, they cannot keep on the highways in making deliveries.

Q. Is it the practice of your company to look for good locations for your equipments? A. It is.

Q. And in that respect you go off into the by ways? A. If there was sufficient business that warranted it and inhabitants enough, yes.

Q. But in looking for good places you would seek
1631 the by ways? A. Yes, we would seek the by ways.

Q. And as a matter of fact you do not pay any attention to competition at all when you make your installation; you just install them wherever you think you can sell gasoline and the public needs a pump? A. That is all.

By Mr. Speer:

Q. There was some testimony to the effect that those leasing and loaning these equipments leased and loaned them to irresponsible people which made it a bad thing for business. What do you say as to whether or not you do that? A. It is not a fact. We inquire very
1632 particularly into that. We would not have them represent us if they were not of good character.

Q. It was also testified as they did not own these equipments they were careless and did not take proper care of them? A. We watch that point.

Q. And is that a fact, that you have any trouble particularly on that account? A. None.

By Mr. Zechiel:

Q. You do not know of that matter intimately yourself, do you? A. Oh, yes.

Q. You get in touch with the actual pumps as they are distributed? A. I go out on the field and have meetings of my men and discuss the subject with all my men, the sub-station men and altogether at various times, at short intervals and I have them in New York and discuss the question very thoroughly.

Q. And in your experience you have never found any number of installed pumps that were put in that were not profitable to your company? A. No, we keep an exact record of all the pumps and the amount that passes through them, a daily record of those.

1634

By Mr. Speer:

Q. And there was some testimony that these loaned installations were unprofitable, many of them. What is your experience? A. I should say they were all profitable.

Q. How much, Mr. King, have you invested in these loaned equipments? A. Two and a half million dollars, two million four hundred and some odd thousand, to be exact.

By Mr. Zechiel:

Q. In that respect what per cent of your business is done through those pumps that are leased or loaned? 1635
A. Of our total business?

Q. Let us confine it to your total business to retailers of gasoline products? A. To our total business it is 48.9 per cent; to our automobile business about, I think, it is sixty-eight.

Q. Sixty-eight and a fraction I remember you said before? A. Yes.

By Mr. Speer:

Q. Can you tell the amount of your investment in tank wagons, approximately? A. Yes.

Q. How much is it? A. I should judge it is about six million dollars, that is in automobiles, but there is a greater investment in others, in the horse drawn; but we have about thirteen hundred automobiles and they are worth between four thousand and five thousand dollars apiece.

Q. And besides that you have horse drawn? A. We have horse drawn.

(Witness excused.)

1637 Whereupon, at 12:30, P. M., a recess was taken until 2:00 P. M.

After recess, 2:00 P. M.

RICHARD D. LEONARD, was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct-examination by Mr. Schekter:

Q. What is your position with the Atlantic Refining Company? A. General manager, domestic sales.

1638 Q. How long have you been with the Atlantic Refining Company? A. Twenty-five years.

Q. During how much of that period have you been general manager of sales? A. Five years.

Q. Prior to that did you have a general experience in the marketing and sale of your petroleum products? A. Just tracing down the experience, probably to come in logical order, I went through the accounting end of our business, the purchasing end of our business, the cost keeping, then over into the refinery, in charge of our time keeping and the labor employment and then became superintendent of our mechani-

cal department or construction department. That led me into a supervision of the construction of our distributing stations and gave me an experience in the distribution of our products which led into my being made manager or general manager of our domestic sales.

Q. And your company is engaged in the business of refining and distributing? A. Yes, refining and marketing of petroleum products.

Q. And in what territory do you operate? A. Well, we operate in the tank wagon business in Pennsylvania and Delaware; in other general lines in tank 1640
car business or in shipments of barrels, steel barrels or wooden barrels and in our asphalt business we practically market east of the Mississippi. In addition we have a big export business.

Q. From what source do you secure your raw material? A. Our crude oil is purchased and produced by ourselves both from the Pennsylvania regions, the Appalachian, the Midwest and Mexico.

Q. Has it been your business policy and practice to endeavor to reach and sell to the ultimate consumer as well as to the distributor? A. Yes, I would say as a general policy our effort is to serve the consuming public and to reach them by the best means possible; 1641
where that means is through the medium of a dealer well and good; if not through a dealer, then direct.

Q. Can you tell us briefly whether there has been an increased demand for gasoline in the past five years? A. Yes, I would say that the increase in the demand for gasoline in the last five years is probably in fair proportion to the increase in the number of automobiles, which is practically ten fold.

Q. And prospectively do you consider that there will continue to be such an increase? A. The increase will come particularly in the use of commercial ve-

hicles, where one commercial truck will use six or seven times as much gasoline as one passenger car. The great increase is going to come from the widespread and general use of trucks as commercial vehicles.

Q. Will you please define briefly again the general problem of distribution of your products? A. On the gasoline and refined oils we distribute through the medium of tank wagons in Pennsylvania and Delaware. In addition we would have a tank car business or a barrel business; for instance in refined oils we
1643 have a large business with the railroads, where the refined oil would be shipped in barrels or in tank cars to the various railroads, wherever they may be, in New York State, New Jersey or Ohio or what other states. In our lubricants we have a large business direct with the consumers in Pennsylvania and Delaware and a large jobbing business. In our asphalt we market and distribute in practically all states east of the Mississippi River. Fuel oil logically finds its consumption nearer the sources of supply, that is if the demand is big enough.

Q. In the distribution of gasoline is a container required? A. Yes.

1644 Q. Formerly what form did that container take? A. Previous to the institution of distribution by the medium of tank wagons or tank trucks it was shipped in barrels. The requirements from a wooden barrel came to a steel barrel, on account of transportation requirements of the railroads.

Q. Did the barrel or steel drum serve the purpose of storage in addititon to transportation? A. Yes, with the average dealer or with the farmer or with the consumer that was using it, and he naturally held it as long as he could as a medium of storage.

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Q. And during such period of use for the purpose of storage do you know whether or not there was a charge or whether they were loaned? A. No, the practice is to retain ownership in the package, I am speaking now of steel barrels, and only to make a charge where the package is not returned within a reasonable time. In our instance we have always rendered a service charge after ninety days as an inducement to bring the package back.

Q. The natural development of the steel drum and barrel, in view of the increased trade has been the curb pump equipment?

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Mr. Burdeau: Objected to as leading and calling for a conclusion.

Q. What has the development of the medium of transportation and distribution after the steel drum? A. You are asking now for the development of the gasoline business?

Q. Yes. A. Tracing back in my own experience, from 1914, I would say that our preparations came in the form of having need, as our construction superintendent, to make a survey of the States of Pennsylvania and Delaware, in which time I visited practically every town of two thousand inhabitants or over and endeavored to make a study of the prospective or potential business in that vicinity for gasoline or for any of our products while I was at it. That resulted in the building of storage facilities consistent with what we regarded as the on-coming business. The storage facilities naturally suggested the additional facilities for delivery. The delivery naturally suggested the storage facilities to take care of the volume of business that we saw forthcoming. That is where the tank and pump linked in with the general process of distribution.

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1648 *Richard D. Leonard, Direct*

Q. In your general survey of the storage situation in the localities in which you operate did you find that compared favorably with the demand for gasoline? A. No, very unfavorably. Of course our criterion is the storage or distribution which had been established over a number of years for kerosene. I would say that even today as an example the storage for kerosene in Philadelphia and Pittsburgh is greater in point of distribution than the facilities for gasoline distribution all over the State of Pennsylvania. In other words in the Cities of Philadelphia and Pittsburgh for kero-
1649 sene, which represents relatively a small proportion of the total business, there are probably eight to ten thousand distributors. Now, that is pretty near the total of all distributors for gasoline in the States of Pennsylvania and Delaware. By distributors I mean those who are handling gasoline for resale.

Q. What was the percentage that you found as an average of storage supply for a period of one month? A. Well, the storage that you have reference to is a study which we made practically within the last six months or rather in the early part of this year in which we took the number of automobiles in the vicinity of any one of our stations, or as a matter of fact in any
1650 town in which any of our wagons was serving and from that we figured what the consumption of gasoline was in that vicinity and we lined up against that all of the known storage available in that vicinity to take care of that volume of business. Now, I can read to you what that was if you wish from a brief statement.

Q. Yes. A. We did it primarily to economize on our delivery service, that is to see where were the towns that inadequate storage was occasioning repeated trips to the same point where one trip would have been adequate.

Mr. Zechiel: Now, just a moment. My understanding is you are going to put on the record the results of this investigation?

Mr. Schekter: Yes.

The Witness: It is very brief.

Mr. Schekter: It is very brief and represents a general condition of inadequate storage, which, of course, the witness has stated is directly related to the problem of distribution.

The Witness: In most of the outlying points we 1652
endeavor to route our wagons so that they are covering a definite systematic route and will be in certain towns on certain definite days, and naturally we try to get the storage in those towns to be of sufficient size to cover that loss of time between the wagons calling there. Now we aim towards putting in the State of Pennsylvania, particularly in the outlying points, those points which are away from our refinery points, adequate storage to carry a three or four weeks' period. For instance, Allentown, which takes in the Bethlehem eastern section, Quakertown and that vicinity, shows that the peak month of business, as we figured it, was six hundred 1653
and fifty thousand gallons of business. The available storage was only two hundred and fifty thousand gallons, that is all the known storage for gasoline; that that figure was forty per cent of a month's, or rather from ten to twelve days' storage was available. We regard that as a very good point for increasing storage facilities. The percentage ran through the state: Bloomsburg, 42 per cent; Harrisburg, 36 per cent; Hazleton, 69 per cent; Lancaster, 35 per cent; Lockhaven, 41 per cent; Norristown,

1654 *Richard D. Leonard, Direct*

21 per cent; Reading, 47 per cent; Scranton, 45 per cent; Sunbury, 71 per cent; Williamsport, 32 per cent; Wilmington, 44 per cent; York, 44 per cent; Wilkesbarre, 31 per cent. A general average storage of 40 per cent of a month's stock. The general average is that over the state, and aside from cities like Philadelphia and Pittsburgh, the storage was about a ten or twelve days' supply.

Q. I would like you to explain, please, a little more fully, just how the question of storage in a
1655 designated locality is a matter for real consideration by you in your problem of distribution of your product? A. It enters into your expense of marketing. Your expense of marketing divides itself up roughly like this: 60 per cent of your expense is your delivery expenses, 20 per cent is normally your overhead office expenses, that is your main office expenses, and 20 per cent is your direct selling and station expenses, aside from delivery. Now that naturally points that you can not economize very much on your general office expenses, neither can you cut down very much on your direct station expenses, like managers and so forth, but your big effort in econ-
1656 omy has to come from your delivery proposition, which is 60 per cent and which is a more or less flexible item. Our study came down to a point of economizing on repeated deliveries to one point. As a general fact, it costs fifty cents a mile for motor truck delivery. Now, we figured that somewhat like this method, that a haul of ten miles for an average load of 500 gallons cost you one cent a gallon. Ten times 50 cents is five dollars, that is a cent a gallon for making that haul. Where we were making a haul and only making a delivery of 250 gallons, instead of costing a cent, it was costing us two cents

to make that same delivery, or where we were making a delivery of 100 gallons, emergency deliveries, some people being repeatedly out, that meant that it cost us five cents, with no real opportunity for any differential in price to make up for that emergency expense, therefore, our effort was to increase storage and make large bulk deliveries at any one point.

Q. Did that lead to any definite policy on the part of your company with relation to the curb pump equipment and storage? A. Yes, it led to a very definite campaign on our part to put that storage in either by direct sale or by lease or loan. 1658

Q. And the campaign was to put it in in the form of what kind of equipment? A. In the form of tanks and underground storage, which is normally required everywhere, and through the medium of the measuring pump.

Q. Do you regard the curb pump equipment as a part of your general equipment for distribution? A. Yes, we carry those that are leased or loaned or we carry those which are salable in our normal stocks. Those that are leased or loaned we carry as a plant item.

Q. Do you class it as a medium of distribution? A. Absolutely, we look on the tank or pump—I do not want to anticipate your questions, but I am hoping it will just clarify the situation—in the first place, it is a medium of wide and adequate distribution both in volume and over territory, that is, it reaches expanse. As our merchandising policy we are naturally always studying how to reach the automobile operator, naturally we are constantly studying the best means of reaching him with the shortest cuts, and where that is through the medium of direct service we accomplish it in that way. Where it is 1659

through the medium of a dealer we will invariably try to do it through the medium of a tank and pump, because that is the best known vehicle that we know of to accomplish the purpose of adequate, safe and reasonable service to the consumer for our particular product.

Q. Is there any question at all that the curb pump equipment as now in use is vastly superior to the former method of distribution through the steel drum and barrel?

1661 Mr. Zechiel: I am sure the government would concede that.

Mr. Burdeau: We will agree that the curb pump is the best available means of retail distribution.

Mr. Hayes: We all agree on that.

Mr. Zechiel: We all agree on that absolutely.

Mr. Speer: We approve and believe it is true.

Q. In the installation of this curb pump equipment, are you guided at all by the question of competition or what considerations do influence you? A. I
1662 think in the conduct of our business we take very strong cognizance of our competition and unquestionably the tank and pump has that feature to it, as well as any other branch of our business, that we have our eyes and our ears always open to the acts of our competitors.

Q. Is the installation, then, a question of competition or is it a question of a desirable location in the distribution of your products? A. The predominant factor, of course, is the distribution of our products. I think I could illustrate where the competi-

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tive feature comes into it by practical instances that have come under my own observation.

For instance, we study very closely from our statistical records in various sections what is the gasoline that we are selling either through the medium of garages or through the medium of direct service and through the medium of our stations by the number of automobiles and the average sale in any one month, dividing the number of automobiles into the gasoline sold. Now, where we find that comparing one territory with another that the average is very low, there it becomes the manager's duty to study 1664
what are the conditions that cause that low sale.

Now, we had a particular instance in the Wilkes-Larre territory where it was found that in a territory served by one of our stations and covered by one of our drivers or by one of our salesmen that his sales for the cars there were relatively low compared with the general average of the state or with men working in adjoining territories.

Now, I covered that territory with him and in the Town of Nanticoke and also in the Town of Plymouth, both of which are mining towns, and where we had the direct number of automobiles registered from that town, it was found where normally 1665
our sales might be from twenty to thirty gallons per car, in that town the sales ran down as low as eight and ten gallons per car. The picture that presented itself is this, that man was really confident in his own mind that he was getting the business there because he had the business of two garages that were in the town.

Nanticoke is located along the Susquehanna River. The Susquehanna practically bounds it on one side and the hillside on the other; the main street of the

town runs directly through it, parallel with the river. One garage was located down towards the river bank and the other garage was located upon the side of the hill. The entire traffic was through the main street of the town and all of the merchandising of that town was done on that main street. What had really happened was that our competitors, I will say the Maloney Oil Company, the Pure Oil Company and the Gulf Refining Company had all been good enough merchants to install on that main street their medium of service to the people that owned auto-
1667 mobiles in that town and the Atlantic Refining Company had not. We had to serve those people through the medium of two inadequate garages misplaced as far as service was concerned. As far as a competitive proposition was concerned, I considered it good merchandising on our part, having advertised our products, having created a demand for that product, to put it where the people could really get it, and I put two curb pumps at either end of that town and on the main street.

Q. You have engaged, then, in the installation of the curb pump equipment as a direct outlet for your
.668 gasoline products? A. Yes, we both sell the Gilbert & Barker outfits and we lease or loan them.

Q. You purchase the equipment from what manufacturers? A. Gilbert & Barker Manufacturing Company.

Q. Have you purchased the equipment from the Bowser Company? A. Yes, we have purchased from the Bowser Company.

Q. What, if any, restriction has the Bowser Company required in the case of their sale of pumps to you? A. Well, any purchases that we would make from them were for our own use in the establish-

ing under those lease or loan agreements and not for resale.

Q. Do you find in your experience there has been any delay in getting equipment of this kind which was ordered from pump manufacturers? A. Yes, I will say our experience is particularly with the Gilbert & Barker Manufacturing Company and that any deliveries for pump or tank equipment or practically all orders for pumps and tanks are seriously delayed at the present time.

Q. Do you regard that there is sufficiently adequate storage at the present time? A. Decidedly 1670
no.

Q. And do you think there have been installed more tanks than the trade requires? A. No, sir; I have pretty nearly answered that question by—my own picture is the on-coming rush of the demand by commercial trucks where practically, although the numbers of commercial trucks of the country today are probably not 25 per cent of the total number of vehicles, as a matter of fact, it is nothing like that, it is about 10 per cent, there are six million machines in the country as I understand it and there are less than six hundred thousand commercial trucks, and yet it is a fact that the commercial truck is con- 1671
suming today almost forty per cent of the gasoline. Now that transpiring in territory we do business in, we realize it is going to mean very adequate storage for the operation of that fleet of vehicles, particularly in the outlying points.

Q. I think it has already been described, but I would like you to state briefly on the record the component parts of the equipment, unless it may be agreed—

Mr. Zechiel: Yes.

Mr. Hayes: We will make an agreement.

Mr. Zechiel: I was just going to ask whether or not with your way of handling all your products, whatever you handle, that are lubricant products or products of oil and also your oil, whether you do not handle those in every particular substantially as Mr. Gatchell and Mr. Young have explained.

Mr. Schekter: No, I prefer not, if you do not mind.

Mr. Zechiel: I do not mind. I thought that was probably true.

Mr. Schekter: As to the equipment parts of a curb pump equipment and the necessity of installation of the same at the particular locations, it is admitted that the testimony will be substantially similar to that given by Mr. Young this morning.

Mr. Hayes: On examination by Mr. Hayes, so that you can identify that particular question.

Mr. Schekter: Yes.

Mr. Zechiel: Yes, I am sure that is true.

By Mr. Schekter:

Q. What is your policy with respect to the sale as opposed to the lease or loan of the pump?

Mr. Hayes: The stipulation, as I understand, is in here with reference to the question just spoken about.

A. We regard it as something that ties in very definitely with our entire merchandising effort or policy. I will say that our starting point is to create a demand for our product. We do that through the

medium of advertising or through the medium of the circulation of literature, through the medium of putting up painted bulletins along the highways, but in some way we acquaint the public with our particular product and ultimately we have to reach them so that they can identify our particular product.

Now, in that respect we are not a bit different from a man that is merchandising anything else, whether it is candy or shirts and collars. He has to create a demand and sell the consuming public. We have various channels through which we reach the ultimate consumer. A great deal of our business is 1676
done by direct delivery to them. We do a considerable business through the medium of dealers, where the dealer becomes a clearing house for us. We have established our own service stations, and those are probably the three major methods by which we do our business.

Where we do our business through a dealer we naturally have to consummate our merchandising effort by seeing that the public, when they do go to him for our particular product which we have sold to him and on which we spent money to create a demand, can identify it, and we feel that the tank and pump is the best known means by which we can 1677
identify and assure the public of getting a safe, accurate and reasonable measure of our proposition.

Q. And therefore your primary object is to install a curb pump equipment with the dealer at the proper location? A. Yes, the location itself is a very important part. I would say that the installation, for instance in the instance of the two garages at Nanticoke, where they were off the line of traffic and where it was inconvenient for people to go to them did not have any of the elements we like to see in the tank and pump proposition at all.

Q. In the installation of the equipment is it a matter of concern to you as to whether the equipment is purchased by the dealer or whether it is leased or loaned to him? A. I would say we are more or less neutral on that proposition. The greater part of our tanks and pumps are sold. The relation is almost four to one. But there are not any of the merchants to whom we sell a tank and pump that do not have a fair knowledge that we will lease or loan if the location is desirable.

1679 Q. And when you say the ratio is as four to one, you refer to the ratio of pumps sold being four to— A. Pumps sold are about four times the number we lease or loan.

Q. Do you find in your experience that you find a good location for the establishment and installation of a curb pump equipment where the owner or lessee of the location is unwilling to make the investment in an equipment or has not the capital to do so? A. I would say the general average is that a man has to have some period of time over which to pay for his material, pay for his installation. The problem of selling it to him is relatively simple. Our usual
1680 method of approach in selling a man a tank and pump is to point out to him that in that town there is a certain consumption of gasoline which is based on the number of machines that are operated in that vicinity. The measure of profit is practically fixed, that is, over Pennsylvania and Delaware there is almost an established retail price of 27 cents. The dealer's price is seven per cent off of that. His measure of profit is 11 per cent, practically. Now, in a given town or in a given section, if there is a certain available volume of business measured by gallons and by putting in that tank and pump that

man can share in that proportionately, your selling is to anticipate what he could sell and his rate of profit is so much and normally the rate of profit in one year will almost pay for the man's investment in the equipment.

Q. That is your agreement to him in the effort to sell him a curb pump? A. Yes, it is a big return on the invested capital. It is certainly a bigger return than almost anything else he could put his money in.

Q. Do you find in your experience, notwithstanding that argument, an owner or lessee of a desirable location is unwilling to make the investment? A. Unquestionably I would say that the instance at Nanticoke is fairly typical. The men that we put in those tanks and pumps with were men who had never thought of selling gasoline before. One, as I recall, was a cigar store man who was a jolly good fellow and who, we thought, everyone would like to go to, and we thought it was a good location. I would have considered it rather presumptive to try to sell it to him, but the actual result was we were very desirous of selling the people there where we thought we had created a market for our product and to cash in on the merchandising effort. 1682 1683

Q. And in the case of leased or loaned equipment is it your practice to give the dealer the option of purchasing outright? A. Our agreements provide that he has the privilege of purchasing on due notice.

Q. Do you market your product under a trade name? A. Yes, Atlantic gasoline.

Q. And do you regard that trade name as a valuable asset in your business? A. We measure it by the amount of money that we have spent in creat-

ing something that has been built up over a long period of time and with repeated and consistent advertising and merchandising and naturally it is a very valuable asset.

Q. And built up and maintained by maintaining a good, uniform quality of gasoline? A. Absolutely.

Q. Do you find in your experience that a consumer of gasoline prefers a particular brand or does he buy indiscriminately? A. Oh, I would think that the average consumer of gasoline is very much wedded to a particular brand.

1685 Q. Is there— A. A man does not want to change from one grade of gasoline to another. If he is getting good satisfaction out of Texas or Atlantic or Gulf, in all probability he is going to stick. You are asking about a consumer. Yes.

Q. In the marketing of your gasoline is there any way in which you can assure the public and assure yourself that the public is getting your brand of gasoline under your name than by the use of this equipment with your name labeled on it? A. It is a liquid material. We would either have to put it up in packages duly sealed and labeled or put it in some form of receptacle which would contain it in larger

1686 quantities through which it could be measured out under some identifying mark. Now, the pump and tank is that. Practically all the pumps and tanks— I will say invariably the tanks and pumps, or the pumps, at least, we sell or lease have a seal on it with our name and also a globe attachment illuminated, that has our name on it. I would say, also, that the man we do sell that he regards that as part of his purchase, that he wants the pump with our name on it, because he wants to cash in on the proposition.

Q. Irrespective of the question as to whether you have sold him equipment or loaned him equipment, is it the fact or not that he requests that you loan him a globe so that the public may know he is selling Atlantic gasoline? A. He wants everything that would go with the proposition that we have sold him. The globe that we sell them is not in the purchase price. That we practically loan a man, regarding the investment in the globe as good advertising.

Q. Do you find, Mr. Leonard, in your experience, that a retail dealer of gasoline generally adheres to one company or does he change often and promiscu- 1688
ously? A. I would say the changes are more on the part of the oil companies rather than on his part. That is very frequently for matters of credit or because we will consider it inadvisable to give a man beyond a limited amount of credit, whereas another company might have an entirely different viewpoint. We will drop a man and another oil company may take him on. It may be that after they have learned their lesson, he will come back to us. But the changes come about in that way. You only learn that, there is nothing inconsistent about that, you only learn about a man by dealing with him.

Q. Given a satisfactory service to the retail dealer 1689
and satisfactory credit by him to the oil company, would you say that it was generally your experience that the dealer adhered to the one oil company in the purchases of his gasoline? A. I would put it this way, Mr. Schekter, that by far the biggest percentage of the people we are dealing with, ranging anywhere from 80 to 90 per cent, are people that we have been dealing with or serving over a long period of time and that they do not change, but that does not mean that they will not deal with another com-

pany. There are any number of companies that deal with us as well as dealing with another.

Q. You have testified that the proportion of sales of equipment made by you far outnumber the leased and loaned. Can you tell us approximately the percentage of the dealers to whom you have sold curb pump equipments who still purchase their gasoline of your company? A. The answer would be more or less general, but I would think the same range, anywhere from 80 to 90 per cent of the people we have sold outfits to are still people we are doing business with.

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Q. It has been testified to here that it is a practice and some witnesses have said it was the common practice for a retail dealer to undertake to sell through a trade name of a company the product of another company. A. No, I do not agree. I think that that is not a predominant thing at all. Those things may happen among irresponsible dealers, but they are always subject to immediate correction if it comes to our knowledge and I think the average company does correct it immediately.

Q. And the correction consists in what? A. In their having the man adhere to his contract of having that receptacle used for your material or it is removed.

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Q. Do you regard the— A. Of course there are occasions—I do not want to modify the testimony excepting that there are emergencies arise where a man would be very foolish to permit his trade to go unserved simply because he could not reach the Atlantic wagon in time when another wagon was available. We would regard in such cases that it is entirely within the good judgment of a man to take the gasoline that is immediately available.

Q. Would you regard the number of those cases as many? A. No, I would regard it as rather practically as something that is not a factor at all in the conduct of your business.

Q. Would you say it is practically negligible? A. The uses of your equipment for—

Q. For oil of other companies? A. I would not say it is negligible. I would say this, that occasions do arise and you take care of them, although I have not any idea of the number, whether—but it is a negligible proposition when it is a question of removing outfits for that reason. 1694

Q. In your opinion has the practice of selling and leasing and loaning curb pump equipment increased or decreased competition? A. I think the establishment of a tank and pump at any point is a medium of creating business. I would liken it very much to the establishment of the United Cigar Stores on any prominent corner; it is an invitation to buy, and whether you know it or not, you are increasing the consumption of cigars. Just so, I would regard the installation of a tank and pump at any convenient point as a medium for the creation of a demand for your particular products and the consumption of gasoline in general. 1695

Q. Do you believe there are more jobbers in the business today than there were three years ago, say? A. Yes. Of course, the increase in the number of people going into the oil business is notorious. Every newspaper has a list of charters that are going in. But I would say that the thing which is most noticeable to me is the expansion of the smaller man, that where a man was previously doing a business localized at one point, he is now doing a business from several points.

1696 *Richard D. Leonard, Direct*

By Mr. Hayes:

Q. Why is that? A. Purely because he has found a convenient medium of meeting the demand and he finds the tank and pump is a very adequate means of expanding his business.

By Mr. Schekter:

Q. The service station is likewise a medium for reaching the consumer? A. You are speaking of a service station operated by the larger company itself?

1697 Q. Yes. A. Oh, yes.

Q. The element of cost of that, however, is prohibitive in sparsely settled districts? A. Yes, you have to have a service station where there is a big volume of business and at a location where there is a big passing trade, a big vehicular traffic.

Q. A curb pump equipment serves the purpose of a service station in the more sparsely settled localities? A. It also serves the purpose in the larger cities. Take a city like Philadelphia, Philadelphia covers an enormous area. There are certain streets that predominate as mediums of traffic. For in-

1698 stance, Broad Street is a conspicuous street and we regard Broad Street as a very good street for service stations. We also regard Walnut Street as a good street for service stations. But there are hundreds of streets in Philadelphia over which cars are operating and where the pump is unquestionably the medium of service.

Q. I have taken from the notes of testimony specific cases of complaint mentioned by witnesses in the testimony offered by the Commission and I have asked you to ascertain the accuracy of the testimony given by the witnesses, and, Mr. Examiner, with-

out waiving my objection to the testimony given by those witnesses on the ground that it was purely hearsay testimony and not of their own knowledge, I desire at this point to offer in rebuttal the testimony of Mr. Leonard as to the specific cases of complaint. You might take the case of Mr. Norman, Wilmington, Delaware, first. A. Do you want to recite what the testimony was and I give the answer? That was a case in which Mr. Hearn testified that he had lost the business of the Norman Company on account of our leasing or loaning the outfit.

Q. Yes. A. The information which I secured at 1700
Wilmington—

Mr. Burdeau: That is hearsay, too, is it not?

Mr. Schekter: No, it is direct from Norman.

Mr. Burdeau: Yes, but it is hearsay.

By Mr. Zechiel:

Q. How did you get the information? A. Through the medium of our manager and the company itself.

By Mr. Schekter:

Q. You are testifying here as to the exact facts 1701
and circumstances surrounding and leading up to the installation of the equipment with Mr. Norman, as shown by the correspondence and your records? A. Yes.

Mr. Zechiel: I shall object to the admission of the evidence, Mr. Examiner.

Mr. Burdeau: I do not object to it at all. I am willing to let it go in, but I want it pointed out that the criticism was made that we were introducing hearsay evidence and this

is nothing but hearsay. I do not object to it.

Mr. Schekter: I disagree with the contention of the attorney, because this is the witness's own knowledge of a transaction which he himself negotiated with a retail dealer.

Mr. Hayes: With Mr. Schekter's permission, as I understand it, the question is asked and the objection made and the reason stated for the objection and then the witness proceeds to answer the question.

1703 Examiner Dunham: That is the safest rule, it strikes me.

Mr. Hayes: Just so it gets in and is not stricken out.

Examiner Dunham: Let the witness proceed.

Mr. Hayes: Mr. Schekter has not finished yet.

Examiner Dunham: Did you want to say anything?

Mr. Schekter: I assume the reporter took my statement that the witness is testifying of his own knowledge—

1704 Mr. Burdeau: Let us have Mr. Schekter sworn on that proposition. The witness's own testimony is what we are bound by.

Examiner Dunham: I do not see how in the world the reporter can take you when two or three are talking at once. Have we reached a point where the witness can answer? If so, proceed.

Mr. Zechiel: Just a minute before we go any further. If I am to understand that the statement of the attorney for the Atlantic Refining Company is to be taken as the facts, that Mr. Leonard is testifying from his own in-

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formation that he actually gathered by direct investigation on the grounds, then I do not approve of that. I do not believe that that is the fact and I do not think the record ought to show anything like that unless Mr. Leonard himself is willing to testify that he did get his evidence in that way. I am perfectly willing that it shall go in as the facts are.

Mr. Burdeau: I suggest we find out how he got that information.

Mr. Hayes: You will get it.

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The Witness: Let me state exactly what I did. Mr. Schekter notified me of these various questions that came up. Now, in the instance of Wilmington which was adjacent to Philadelphia, on Saturday I was in Wilmington and I discussed the proposition with our manager at Wilmington station that is responsible for this installation. He told me exactly what the circumstances were regarding this installation. In addition to that, he confirmed it by having a letter from Mr. Norman, who is the principal of the proposition, stating exactly what the circumstances were, which letter I have here.

By Mr. Burdeau:

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Q. Let me ask just one question. Until you talked with those gentlemen on that date, you knew nothing about this transaction, did you? A. What do you mean, that I did not know anything about it? Do you mean I did not know there was any question about it?

Q. Until you talked to those gentlemen on the occasion you have just mentioned, you did not know anything at all about the facts and circumstances surrounding the installation of your pump? A. I will

say no, that particular pump I did not know anything about, but I did know something about the question—

By Examiner Dunham:

Q. Now, let us get at this in a systematic way, if we can. The record ought to be as nearly correct as we can make it. Now, do you submit this proof as facts that you know yourself or the facts which you relate that were given to you by those who operate that plant down there? A. If you regard a
1709 letter over that man's signature, then it is a fact as presented to me by him. My facts are based on the best mediums of information that I can secure in the operating of a big widespread business. It is impossible to be in physical contact with every particular transaction. My contact comes through the medium of our representatives and through the mediums of the documents that pass through my own personal hand.

Q. Could you make the statement that you are going to make independent of the information that you got from those people? A. As I understand the question, Mr. Examiner, it was the fact that the Hearn
1710 Oil Company had lost the business of the Norman Automobile Company because we had installed a tank and pump. That which I wish to present to you is evidence that they did not lose the business of the Norman Automobile Company and that they have been serving them regularly for the month of November.

Q. Now, do you know that of your personal knowledge that they did not lose the business? A. Only through the evidence of Mr. Norman, showing me in his letter the invoices which he has received for the deliveries made to him.

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Q. Now, Mr. Leonard, if you are depending on him and you are going to give facts as showing to you, would not Mr. Norman be the proper man to swear to those facts? You are being permitted to testify— A. You are getting me into technicalities which I am not conscious of. That is for our attorney to decide.

Mr. Hayes: Off the record, please—

Examiner Dunham: Do not take this.

(Whereupon an informal conference ensued.)

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Examiner Dunham: Let the witness proceed with his testimony and if you have objections, let them be noted and the one who sums up finally will dispose of it.

The Witness: This installation with the F. B. Norman Company was made on the recommendation of our manager, Mr. O. C. Hardy. The indication is that Mr. Norman was extending his garage facilities and putting probably a forty thousand dollar investment in, in an extension to his proposition and had solicited from us a curb pump outfit along one of the main streets in Wilmington. We considered it as we consider all other propositions, at our main office, and we approved of the installation and had a formal agreement drawn up which was negotiated by both parties and the tank and pump installed. As I understand the point was that this was a customer of the Hearn Oil Company and that they testified that they had lost the business of the Norman Company due to our installation.

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Our investigation of it developed that Mr. Norman writes to us as follows:

"For your information, the Hearn Oil Company invoices to us for gasoline and oil for the past three

(3) months are as follows: September, $230.85, October, $112.00; November 1st, $24.30; November 4th, $36.45; November 5th, $19.44; November 6th, $19.44; November 11th, $19.44; November 22nd, $19.44; November 20th, $24.30; November 24th, $24.30.

Trusting that this is the information desired and also that we solicited from the Atlantic Refining Company to have their tank installed for advertising purposes, we are

Very truly yours,

1715 F. B. NORMAN,
President."

That indicated to me that this tank and pump was solicited by this company, that it was installed practically at their request and with our approval on account of its being a good point on a main street in Wilmington and it did not mean the loss of business to the Hearn Oil Company, as they have been served by them regularly all during the month of November.

By Mr. Schekter:

Q. Will you take the next incident? A. The next case that I have a definite report on comes from the
1716 western part of the state, which are reported to us by Mr. Patterson; David Mitchell, Monaca, Pa. If it meets with your approval I will state the facts as gathered through our Pittsburgh agency.

Mr. Mitchell was formerly associated with his father in the Mitchell Lumber Company at Monaca, Pa. At that time they had one automobile and occasionally purchased a little gasoline from the Freedom Oil Works Company to operate the machine. He later built a garage and started business as the Mitchell Motor Company, and we are the only concern that has ever sold the Mitchell Motor Company. We installed

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a T-8 pump and a 20-barrel underground tank for them. Mr. Mitchell advised that he was never solicited for any pumps or tanks by any concern excepting our own and as he had a good location we made the installation. He further states that he is purchasing our gasoline for the reason that he has a demand for it.

In that instance our investigation shows that the Freedom Oil Company never did have the business of the Mitchell Motor Company and that our installation of a tank and pump did not mean any loss of business to them.

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The East Bradford Auto Service, which I understand was a statement made by the Kendall Refining Company, that they had lost the business of this garage on account of our installation. The original equipment of this concern was an old one-gallon Bowser curb pump, which they owned. An automobile backed into this pump and broke it. The Kendall Refining Company immediately installed for them on a loan agreement a five-gallon pump and a five hundred and fifty gallon tank. The garage man stated that he had calls for both Kendall and Atlantic gasoline and if we cared to install a pump he would handle both grades, giving the public their choice of the products.

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In September of this year we installed a T-35 Gilbert & Barker curb pump, putting this pump on the garage man's tank. All we have there is the pump. Both our company and the Kendall Refining Company supply this garage with gasoline, each of us filling our gasoline into the tanks on which pump is connected; that is the Kendall Company putting gasoline through its pump and we putting gasoline through our pump. The Kendall Refining Company had their equipment installed before we put ours in. That does not mean to me that they have lost the

business of the garage but that they are still doing business through their own pump.

By Mr. Zechiel:

Q. That was also just a report from your manager? A. That is a report from our manager covering the circumstances of the installation.

The Wampum Store Company. On November 19th, 1917, we installed there a T-8 pump and one 550-gallon underground tank. We did not take this trade from the Freedom Oil Works. We have always en-
1721 joyed a part of this business. To encourage the sale of gasoline at Wampum and for the convenience of the automobile public we made the installation. At different times we had intended removing this equipment for reason that the Freedom Oil Works Company from their Newcastle station have made deliveries of gasoline through this equipment at various times. Should our equipment be delayed in reaching Wampum the Freedom even yet make deliveries into our tank. We have complained to the Wampum Store Company garage explaining to them it is unfair to use our equipment in that way. That report indicates to me that they are assuming that they had that business
1722 when they did not.

The United Motor & Garage Co., 3868 East Street, Pittsburgh, Pa. This as I recall it is a statement made by Mr. Willock of the Waverly Oil Company.

This concern is operated by Arthur F. Schmidt and Brother. On September 24th, 1919, we installed two T-8 Gilbert & Barker curb pumps and two 15-barrel G. & B. underground storage tanks. This garage was formerly owned by a man by the name of Earl Halliwell, who bought his products from the Waverly Oil Company, Pittsburgh, Pa. About September 24th, Arthur F. Schmidt and Brother purchased this garage

from Mr. Halliwell. Our representative had an acquaintance with Mr. Schmidt before he purchased the garage and when the sale was consummated Mr. Schmidt immediately gave the business to us, even before the tanks and pumps were installed by us. Mr. Schmidt preferred Atlantic products to those of the Waverly. He has a good stand and on account of his being so well located we installed the pumps and tanks, but the installation of the equipment was not the cause of taking the business from the Waverly people, it was a personal choice of Mr. Schmidt to give us the business. The reason for Mr. Schmidt's 1724
preference is that previous to his having bought this garage, he was associated with a firm by the name of C. Dollhoff & Sons, who are in the real estate business in this city, and they buy all of their gasoline and motor oils from us to operate their automobiles.

In this connection, advise that Mr. Schmidt has been instrumental in our securing the business of the Hoffman garage and other concerns in this city, previous to his getting into the garage business.

By Mr. Zechiel:

Q. You are also just reading from the report? A. Reading from the report of Mr. Patterson, our Pitts- 1725
burgh manager.

By Mr. Schekter:

Q. Then he is your Pittsburgh manager? A. Yes.

Q. And those reports have been received by you in the regular course of business? A. Yes.

By Mr. Burdeau:

Q. Those reports were sent, however, after you learned of the testimony given on the witness stand? A. These reports are investigations as to the reports made by other witnesses.

Q. And in order to meet certain testimony in this case? A. No, sir. Mr. Patterson has no knowledge of the testimony. I simply asked him for a statement under what circumstances these installations were made.

By Mr. Schekter:

Q. Go right on with your next case? A. I think it ought to be understood that we are not trying in any sense to mislead—

Mr. Zechiel: Absolutely not, Mr. Leonard. Do not
1727 think that for a minute that any of us think so.

Mr. Burdeau: No. I want it understood that I am not insinuating anything of that sort.

The Witness: Cherry & Kelly, Altoona, Pa. This is a statement made by the Bowser Pump Company, in which I believe the allegation was that we installed these pumps and that they were removed within a very short time.

The father of Mr. Cherry is a man of considerable wealth and he built a garage for his son and purchased from us on April 7th, 1917, two tanks for which they paid. We loaned them two curb pumps on the same
1728 date. Young Mr. Cherry later went to war and his father secured the service of F. M. Kelly to assist in running the garage during the son's absence. In August, 1918, which is only a year and a half later, they discontinued handling gasoline and returned our pumps to us. The tanks which they owned are still at the garage. Later Mr. Cherry withdrew from the concern and it is now being operated by Mr. F. M. Kelly, who does not sell gasoline or has he sold it since 1918.

Q. Go on with your next instance? A. This would indicate that it was more or less hearsay evidence on the part of the Bowser man. Now, that is all I have any report on.

There was a case of H. M. Stahler of Rockville. That is a small town up along the Susquehanna. I secured the circumstances of that installation from our Harrisburg manager by telephone, but asked him to secure a definite statement from Mr. Stahler. That it was impossible for him to get and give me in any written form, therefore, anything I would give you would simply have to be by what has transpired between our manager and myself. However, the entire circumstances are simply parallel practically to these.

Now, there is a final statement made here by Mr. 1730
Patterson that to the best of his knowledge the Waverly Oil Company do not loan outfits.

I think probably a little review of the circumstances of just why a competitor of that kind would not loan an outfit or is not interested in it would really help the entire situation.

The Waverly Oil Company is an independent oil company operated with a refinery at Pittsburgh. Now, I think I know from Mr. Willock's own word just what his policy of doing business is. He has a fixed quantity of crude oil supply—

Mr. Zechiel: I think I will have to object to 1731
that sort of testimony. If the defense wants to prove that, I think they had better put the witness on so that it is not so obviously hearsay. My point is not one of doubting what Mr. Leonard would say because—

Mr. Schekter: To save time I will admit that the testimony be excluded. I did not ask for it. That is all I have to ask.

By Mr. Hayes:

Q. Mr. Leonard, your company's idea is to sell its products? A. For a profit.

Q. For a profit, naturally. And to whom? A. To the consumer, is our ultimate aim, to get our proposition.

Q. And you by the various advertising methods attempt to create a demand among the consumers for your particular products, do you not? A. That is the entire purpose of our newspaper advertising and our painted bulletins, and all the other mediums of advertising that we have.

Q. And you want to get your product to the ultimate consumer practically in the same method, we will
1733 say, as the Quaker Oats Company get their products to the ultimate consumer? A. Undoubtedly, by some means of identification.

Q. Then as I take it the filling stations, the service stations and the garage are the means which the different oil companies have adopted— A. Excepting where they make direct deliveries.

Q. Excepting where they make direct deliveries, of course, to get their products to the ultimate consumer, is that it? A. Yes.

By Mr. Speer:

Q. And even when you deliver to the private garage
1734 from your tank wagon is there any name on the tank wagon to indicate that it is yours? A. Yes, it is very conspicuously displayed.

Q. In reference to your purchase of the Bowser pump, is it not the express agreement with the Bowser Company that you shall not resell the pumps you get from them? A. It was at the time of the purchase.

Q. But that you shall lease and loan them to your own customers? A. That we should use them in our own mediums of service.

Q. Without selling them? A. Yes.

Q. They did not want you to interfere with their sales agents by allowing you to sell pumps? A. It is

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a very logical thing on their part, that they had an established organization and did not want us to interfere with it.

By Mr. Schekter:

Q. Do you recall whether in the distribution by means of steel drums and barrels that your name was on the barrels and drums? A. Yes, the package was identified with our name.

Q. I do not know whether I asked you whether you purchased the different parts of the pumps in bulk and stored them prior to distribution to your customers? A. The two main units, which are the pump and the tank, are purchased from the one company or from different companies. The pipe and fittings and other articles necessary for the installation are apt to be purchased locally.

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Mr. Schekter: You may cross-examine.

CROSS-EXAMINATION by Mr. Burdeau:

Q. What is your experience in retail distribution? A. We do quite a bit of retail distribution.

Q. Do you personally come in contact with the individual owners of automobiles? A. Very much.

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Q. And you know their practices about the selection of gasoline? A. I know their general disposition.

Q. So that when you testified that the ordinary, average owner of an automobile was particular in the selection of the grade of gasoline he used, the brand that he used, that is based on your personal experience with automobile owners? A. It is based on this, that I have made personal inquiry from dealers as to whether gasoline actually was bought by name and the assertion is yes.

1738 *Richard D. Leonard, Cross*

Q. That is a certain proportion of the consuming public demand gasoline of a certain brand? A. Yes.

Q. Do you happen to know what the proportion is? A. The proportion would be measured I presume by what you regarded as the business we are getting as the result of our advertising effort.

Q. I mean is there any way in which you can approximate the proportion; assume one hundred automobile owners; now how many out of that one hundred would be particular about the brand of gasoline they used? A. I could only measure it, Mr. Burdeau,
1739 on the assumption that those people who were using our gasoline were using it because they desire that particular brand of gasoline.

Q. Your experience then is confined to people who use your brand exclusively. You do not know anything about the habits of the other public consumers of gasoline? A. Yes, I know a great deal about the habits of consumers in general.

Q. Well, I say you take one hundred automobile owners, including those who do not use your product, about how many out of the one hundred would demand gasoline by brand or name? A. Well, I would think that—of course it is purely an assumption—
1740 but ninety per cent of the people who are using gasoline today are using a gasoline of their preference.

Q. Well, upon what do you base that assumption? Have you any tabulation of instances presented to you? A. Unquestionably our entire statistics are built up on what we are cashing in on our own investment in creating a demand for our particular product.

Q. But have you any statistics from which you can say that the number of people out of every hundred users of gasoline who will insist on having gasoline of a given name or brand? A. Now, I have answered your question in this way, that I assume our own sta-

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tistics are as good as any other oil company's statistics and—

Q. What are your own—

Mr. Schekter: Let him answer.

Q. Surely. I do not want to interrupt? A. Your question is what assurance have I that there is a demand for any particular grade of gasoline. My answer to you is that our own percentage of the volume of available business is an indication to us of the demand of our particular grade of gasoline.

Q. And your particular grade of gasoline is handled by retailers? A. Only because there is a demand for it, not because it is a pleasure to handle it. 1742

Q. No, only because the Standard Oil of New York or of some other state or the Gulf or the Texas is handled by a certain number of retailers because there is a demand for that product? A. Unquestionably. That is the only reason a retailer would handle any of it.

Q. Getting beyond the retailer and coming down to the individual consumer, how many out of a hundred will demand a particular grade of gasoline? A. I have told you my own experience is that nine men out of ten or ninety out of a hundred will buy the gasoline of their own preference. 1743

Q. To follow that to the logical conclusion, nine out of ten will demand your own product? A. I do not see that process of reasoning. I said nine out of ten would buy a gasoline of their own preference. I would be very happy if nine out of ten would buy ours.

Q. I see, you are quite correct, Mr. Leonard. Did you testify that in your opinion the number of leasing and loaning pumps and tanks tended to increase

competition? A. Yes. I do not know that I testified to that, but I—

Q. I had you down as testifying to that? A. What I did testify to as I recall it is that it has had the tendency to expand the business of our competitors and particularly of the smaller competitors.

Q. What is your opinion as to the effect of competition, does it increase or decrease competition? A. It has unquestionably increased the competition purely because it has increased the volume of available business.

1745 Q. Competition between whom, Mr. Leonard? A. Between—now, just what do you mean? You ask me the question whether it has increased competition?

Q. That is the question which was put to you by Mr. Schekter, and I want you to tell me what particular competition you had in mind when you answer that? A. I can give you an instance, the Maloney Oil Company. I will say four years ago they were doing business practically exclusively in Scranton. Today through the medium of leasing and loaning outfits they are doing business in Wilkes-Barre, in Shamokin and in Pottsville.

Q. Then you regard the lease and loan agreement
1746 as a device to get new customers? A. I regard it as a medium for the extension of their business.

Q. As a matter of fact is not the way I put it correct, that you regard it as a device to get new customers? A. If you want to phrase my answer for me I will not accept your language, no. I do not say it is a medium of getting new customers. Can I ask to have the original question read and my answer?

(The previous question and answer were then read as above recorded.)

Q. Don't you regard the extension of a man's business, the getting of new customers? A. Yes, I will say it has got to be.

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Q. And it was the same thing in the long run, was it not? A. What is the same thing?

Q. Extending business and getting new customers is the same thing, is it not? A. Yes. I will say that is correct.

Q. Now, what particular kind of competition was increased by the use of the loan or lease agreement? A. I would say that previous to the Maloney Oil Company coming to Pottsville that they were not a competitor there. Now, today they are a competitor there.

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Q. Because by the use of these loaned and leased equipments they have obtained certain local dealers to handle their product? A. They have put in tanks and pumps at logical places for distribution and extended the distribution of their material.

Q. And without such loan and lease agreements they would not have been able to enter Pottsville, is that correct? A. No, I could not answer that.

Q. Did you not cite this as an illustration of your statement? A. Yes, but I could not answer you that they would not have to come into Pottsville.

Q. Do you attribute their getting into Pottsville as the result— A. I attribute it as a means or medium for establishing their business there.

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Q. And by the use of that medium for establishing their business there they get the business from men who would have dealt with other companies? A. No, I do not know, they may have people there that would never have been in the gasoline business at all if it had not been for the tank and pump as a medium for doing business.

Q. That is a perfectly fair answer and something I wanted to develop. You cited an illustration of some city in Pennsylvania where you put in two pumps and tanks where there had been no dealers at all, on a

certain street. Is that correct, Nanticoke? A. There were dealers but they were off the main highway.

Q. I mean by the installation of your two sets of equipment, two additional dealers were added to that territory? A. Yes.

Q. What is the proportion of new dealers which have been created by this arrangement to the number of existing dealers with whom you have installed tanks and pumps? A. Do you mean over the past four or five years?

Q. Yes? A. I would think that such a number of
1751 dealers that have been created over the last four or five years are in about proportion to the increased number of automobiles, that where there were probably a thousand dealers before there are eight or ten thousand today.

Q. And of that eight or ten thousand how many do you think were brought into the business because they could get a pump and tank from your company? A. Oh, absolutely, very few of them were brought into business because they—

Q. Well, your policy is to seek out an existing dealer to put in your equipments with him, is it not? A. Are you talking now about the lease or loan outfits?

1752 Q. Yes. A. I would say we do not seek out dealers. We primarily seek out dealers in logical locations to sell them an outfit, if it is a logical location and we are not represented and we cannot sell them an outfit we consider it good business to lease or loan it.

Q. Can you give me the proportion of— A. Leases or loans?

Q. Yes. A. We sell practically—

Mr. Hayes: That is already on the record.

The Witness: We sell about four outfits to one that we lease or loan; about twenty per cent.

Q. Did you testify that when there was a change from one oil company to another on the part of a retail dealer it was more likely to be the action of the oil company than the retail dealer? A. Yes, those changes come about through a dealer becoming an unsafe risk as to credit or it may come about through some misunderstanding or dissatisfaction.

Q. And that happens occasionally in the case of a dealer who has one of your leased equipments? A. Yes, I would say that that is a fair statement, that it is apt to occur.

Q. All the leases are so drawn as to make it incumbent on that dealer to use your product in that particular equipment? A. In that particular outfit. 1754

Q. What happens to the dealer when you withdraw credit from him and he has your equipment? A. He can buy from us for cash or if he buys from a competitor we withdraw our equipment.

Q. But you regard the contract as binding upon him not to use the product of any competitor at any time in that equipment? A. Unquestionably, that is a part of our formal contract.

Q. Do you ever refuse to supply a dealer who has one of your leased equipments for any reason at all? Has it happened? A. Well, I can only answer you in the general conduct of our business, that it would seem a perfectly feasible thing for me, regardless of whether a man had a leased or loaned equipment, when it comes to the question of his credit, the fact that he has a loan in does not enter into it at all. 1755

Q. Has it happened in your experience that your company has refused to supply a customer who had one of your loaned or leased equipments? A. Yes, and we have removed the outfit.

1756 *Richard D. Leonard, Cross*

Q. And in the meantime he could not buy from anybody else, is that correct? A. Certainly he can. He can buy from whomever he chooses.

Q. But until you remove the outfit he could not use it? A. The outfit is not the only thing a man may have in buying gasoline. He can buy it in steel barrels.

Q. As a rule the garage man, the curb man, has only one outfit? A. As a rule may mean a great many things. There are any number of garages today that have two outfits.

1757 Q. But the larger proportion of garages, curb pump men, have only one outfit? A. I would say in the large city centers the growing tendency is to have two outfits.

Q. Speaking of actual conditions at the present time, embracing the outlying districts and smaller communities as well as the big centers, it is a fact that in the majority of cases the man has only one outfit, is it not? A. I would assume that that is fair, that one outfit prevails.

Q. And did you testify that you believed that the merit of this system lay in the fact that it reduced the cost of delivering your product? A. I said that

1758 that was one of the very important factors of it, that adequate storage is a very important item in economizing on your cost of delivery.

Q. And did you testify you carried these as a part of your own equipment of your own company? A. Yes, we have; lease or loan agreements are a definite plant item.

Q. And when they are installed in some retailer's place of business do you regard that as an adjunct of his business or of your business? A. It is our property.

Q. Do you regard it as an adjunct of his business

1759

or your business? A. It is a medium of his business unquestionably.

Q. And do you carry it on your books as an investment in equipment for your business? A. Yes, we have got to. It is a piece of property that we have got to carry somewheres and it is really a plant item.

Q. And you regard it as a part of the equipment of your business? A. Absolutely.

Q. And a part of the equipment of your distribution? A. That is part of our medium of distribution.

Q. When did your company adopt the practice of loaning or leasing equipment? A. I would say that I 1760
can only answer from the records, definitely for three years, but I feel quite sure that to a more or less modest extent we leased or loaned prior to that. Probably a safe statement would be the last four or five years.

Q. Do you know whether or not your company or one of its competitors first adopted the practice of loaning or leasing equipment? A. I know that leasing and loaning was done before we adopted it.

Q. Do you recall by what company? A. My first information on it came from the companies through the middle west.

Q. I mean, that is in the territory covered by your 1761
company? A. No.

Q. I am speaking now with reference to the territory in which your company does business? A. I can only answer you with certain modifications, that my general impression is that in 1915 and 1916 tanks and pumps were being installed by the companies in the Pittsburgh region.

Q. Did it have any effect on the business of your company? A. I cannot answer that it had any effect. The general tendency of our business was an increasing tendency just—

Q. Do you recall whether or not that had the effect of causing you a loss of customers? A. No, I do not think so. I have no specific instance of our having lost a customer due to somebody loaning him an outfit.

Q. Did your company adopt the practice just about as soon as any other company in that same territory? A. No. I think we were a little bit late. You should understand, of course, that at that time we were merchants of a tank and pump.

Q. You were at all times selling tanks and pumps?
1763 A. Yes, we have always sold a considerable quantity.

Q. Do you prefer to sell them where you can? A. Yes, I do.

Q. That leaves the retail dealer independent of your company entirely? A. Except that he has a tank and pump with our trade-mark on it.

Q. He can remove that if he wants to? A. And our experience is that a great majority of them adhere to it and do not change. I always feel we are reasonably safe on a man we have sold to, and he is our customer for a considerable time.

Q. Do you sell them on credit? A. Over a period
1764 of time a man may have—I would say that the time might extend for a year or a year and a half.

Q. And during that time you are reasonably safe that you have got the customer? A. No. I said our experience was that any man we have sold an outfit to, and a great many of our outfits are sold for cash, is a customer of ours until we do something or he does something that makes it undesirable for us to do business.

Mr. Burdeau: That is all.

By Mr. Zechiel:

Q. Did you hear either of the witnesses this morning? Did you hear either of the New York companies testify as to how they procured their pumps and tanks and equipments? A. Yes, both Mr. Young and Mr. King.

Q. Is your system of method and practice of obtaining those equipments substantially the same? A. I would say the same with the exception that we build a great many of our own tanks.

Q. But many of them you do buy in exactly the same way and install in the same way? A. Yes. 1765

Q. What per cent of your gallonage passes through your leased and loaned equipment?

Mr. Speer: Do you mean gallonage that goes to the retail trade?

Mr. Zechiel: I am speaking now with respect to gallonage that goes to retail trade, yes.

A. Well, Mr. Zechiel, it will be more or less of an approximate figure but I would assume that it would not be more than fifteen per cent.

Q. About fifteen per cent? A. That is on the general assumption that our—we have a big consuming business. That is the business where we are deliver- 1767
ing direct to consumers through the medium of our service stations and our direct deliveries to the trade.

Q. Yes, I am taking all that into consideration, and I think that is understood? A. And that possibly sixty per cent of our business is done through the medium of some form of dealer. Now, of that possibly twenty per cent—

Q. Do you mean a retail dealer? A. Yes, I mean a man that is handling gasoline and reselling it. Now, I would assume that of that the business among these retailers through our lease or loan agreement is

in about the same proportion as our leases or loans are to our sales of tanks and pumps.

Q. About twenty per cent? A. About twenty, not twenty per cent of our total business; probably ten or fifteen per cent of our total business.

Q. And about twenty per cent of the business that you do through retail establishments? A. Yes, and is probably done through lease or loan agreement.

Q. In your examination in chief with respect to the advantage of having large dumping places for your gallonage I think you testified that that advantage
1769 showed itself immediately in the cost of delivery? A. Yes, it is purely a question of the volume that you can haul for definite distances.

Q. I do not know that you testified to this, but in that respect was it your position that by using the lease and loan method of distributing your pumps and tanks you were increasing the dumping, or I do not know what word you used—dumping, is that what you do when you put it into one of those— A. Storage?

Q. No. I mean a single haul, dumping into a particular tank; was it your position by the lease and loan method you were able to make a large number of single haul dumpages? A. Yes, full load dump. Here is
1770 a town that we will say the weekly consumption is possibly two thousand gallons. Now, if we are making deliveries there once a week and we are getting all of the business, if we could make full load dumps it would mean two trips with a thousand gallon wagon. If there is only one receptacle there it means repeated trips, because that man never permits himself to get out and is never in a position to take a full load, so that he always takes a partial load and requires us to go a repeated number of times.

Q. Do you find it in that respect that your lease and loan equipment are more efficient than the equipments you sell to your customers? A. No.

1771

Q. What is your position, that the trade requires more gallonage for storage or more pumps for delivery? A. I think it is both, Mr. Zechiel, that there are too many points of storage that are illogically located and there have got to be more places where it is convenient for people to go without going off the natural route. I cannot see that the gasoline business can be very much out of line with what the kerosene business is. In Philadelphia, as an example you can go out most around any corner and get a can of kerosene, and there are actually in Philadelphia today almost five thousand to six thousand points in the city 1772
where you can go and buy kerosene if you desire it and where people do go to buy it. There are only six hundred points or dealers in Philadelphia to buy gasoline from, which is probably five to six times the volume of consumption.

Q. Do you think the points of distribution of gasoline ought to be commensurate with that of kerosene? A. No, I do not think it ought to be in that proportion because people buy relatively in bigger quantities.

Q. Do you think the points of distribution in the city, say, of Philadelphia ought to be more numerous? A. Very decidedly. I think it ought to be more convenient for people to get gasoline without traveling up back streets and going out of their ordinary 1773
routes of travel.

Q. Would you not say then that the thing which ought to be done in the City of Philadelphia would be to establish service stations on regularly traveled highways for the convenience of the public? A. The two things are entirely different, Mr. Zechiel. On the streets that are intensively traveled, they are the normal lines of traffic for people who come in that direction, but there is a great big expanse of people or territory that people do not touch those main lines of traffic

at all, or who have to travel a number of streets before they reach them.

Q. Let us divide them up? A. For instance in Philadelphia the north and south street is unquestionably Broad Street. It is the one great big common street of traffic. Regardless of West Philadelphia or taking in West Philadelphia there are at least sixty-nine other streets going north and south over which people travel. That same thing applies north and south. There are Market Street, Chestnut Street, Walnut Street, in the central part of the city that are streets of intensive
1775 traffic going east and west. In addition to that there are an equal number, probably sixty to seventy streets that are traveled which run east and west.

Q. Take those centrally located streets where there is live traffic, what is your opinion about it, that there ought to be more pumps there or larger gallonage? A. I think Broad Street is a very logical street for the establishment of very adequate service stations.

Q. So what you need there is less pumps and more gallonage, more highly concentrated service stations? A. I think so. I think that is the logical outcome.

Q. You think that is what will happen? A. That is what I am doing.

1776 Q. Is not that true in a great degree not only of Philadelphia but of other large cities, that service stations with large gallonage will take the place of pumps at numerous places with smaller gallonage? A. No. For instance I will say on Saturday in Wilmington I made a study of the City of Wilmington. It was to supplement a very intensive study that had been made by men in subordinate positions. But I would say that there are only two logical points on which we could afford to spend the money for service stations and at each of those points the ground alone would cost us fifty thousand dollars apiece. There are no

other points that I would consider desirable, where there are dozens of points where a tank and pump would be preferable.

Q. I think you misunderstood my question, perhaps. I only meant that there were places, if not in all the large cities, in many of the large cities where the thing that is needed is a service station with large gallonage similar to what you described on Broad Street in Philadelphia? A. Yes, but it will only serve a relatively small proportion of the total business.

Q. Yes, you will still need pumps and tanks, but you will still have a large amount of gallonage business through the service station and that will be true in many highly centralized and concentrated areas, will it not? A. Yes, I think that where the traffic of any city follows relatively few lines of streets there service stations are very logical, because you have a long stream of traffic passing there regularly. For instance, Baun Boulevard in Pittsburgh is almost the only direct avenue or channel from East Liberty to Pittsburgh and over which thousands of automobiles pass. I recall four years ago I counted them and there were somewheres between fifteen thousand and twenty thousand machines going over it. That is a street with very intensive traffic, a natural funnel for all that traffic to pass over. If the same traffic was spread out over fifteen or twenty streets the service station situation would not be there. 1778 1779

Q. Then you would want pumps? A. Then the only thing you can economically do is to establish a miscellaneous distribution of service, and the pump is the best medium.

Q. Can you state whether you have more or less tanks in the large cities than you have in the small cities, out in the rural territories? A. In proportion to the volume of business there are more tanks and

pumps in the rural districts than there are in the larger cities. The big volume of business is in the cities. For instance if you take any one of the big consumers, take a consumer like John Wanamaker, Gimbel Brothers, Strawbridge & Clothier, the big department stores, their consumption alone in that one company, where there is no tank and pump proposition comes into it at all other than their own equipment, would more than overbalance half a dozen outlying towns where there are fifteen or twenty equipments.

1. 1781 Q. Do you think it is necessary to have the pumps established as frequently as they are in the City of Philadelphia or other large cities, per block? A. There may be some differences of opinion as to the location of tanks and pumps and there may be errors made, but if you are asking that as a general question—

Q. I am asking for your opinion about it, yes? A. Asking as to my opinion. I consider Philadelphia is a good market for the sale of tanks and pumps.

Q. You mean there ought to be more put in? A More of them, absolutely.

1; 1782 Q. And you think you could sell them? A. I would say that the commercial truck is a great big influence in that, that where those trucks are traveling and the streets over which they have to travel are good mediums for the establishment of service.

Q. How many more pumps could you sell than you do sell now, if nobody else leased or loaned these pumps, what percentage of these do you say you cannot sell and have to lease or loan could be sold if nobody else would give them one?

Mr. Speer: Now, that is all very speculative

Mr. Zechiel: Oh, well, let him answer it.

A. What is the potential market for tanks and pumps in Pennsylvania, as an example?

Q. I will get my point. You testified on direct-examination that a certain per cent of pumps and tanks could not be sold but had to be leased and loaned? A. Yes.

Q. And you could not sell them. I am asking this question, if nobody, if none of your competitors would lease or loan an oil tank or pump what per cent of those that are now leased and loaned would buy? A. Well, that would only be a hazard on my part, Mr. Zechiel. There is no hesitancy on my part to answer you except that I cannot answer you without having some faith in my own guesses. 1784

Q. Do you think a good percentage of them would be bought? A. Yes, I think probably an appreciable per cent of them they would buy if they were properly sold on the proposition. The fact is I presume a great many of our competitors are not in the business of selling tanks and pumps.

Q. That is, do you think they lease or loan indiscriminately without trying to sell? A. I will not say indiscriminately. I will say they lease or loan without trying to sell. For instance you have the testimony of Mr. Gatchell, that they make absolutely no effort to sell a tank or pump.

Q. All these leases and loans you make are profitable 1785 as far as sales of gallonage are concerned? A. Yes.

Q. And would be profitable to the owner of the garage, say if it is a garage, if he were to own his own equipment? A. I consider it is a very good investment for a man to make, that he gets a very good return on the gallonage that passes through it. That is where he has a good differential to handle business. There may be difference of opinion on what a man should have who has a differential.

Q. Talking about differentials, if you were to offer a differential in price on large tank wagon deliveries,

say, would that increase the number of larger installations of tanks among your customers?

Mr. Speer: We object to that as immaterial.

A. I think it would but I would regard it as a serious discrimination against a man who is doing relatively the same business and probably has not got the consumption. I would also regard it as one of the cancers of our business that creates dishonesty in our drivers and which we are fighting continually. Anything that gives a man an opportunity to make a
1787 differential gives that man an opportunity to be dishonest with someone else. We have gone through that full load proposition on kerosene. A man will make a presumed full load delivery somewhere and as a matter of fact it is made up of half a dozen individual deliveries brought into one full load when he can take the better price. Anybody that has been in the business a number of years realizes that that does not work, and we are constantly giving serious thought to surrounding our business with those things that protect us against dishonesty.

Mr. Zechiel: I have no further questions.

(Witness excused.)

1788

CHARLES E. WOODBRIDGE was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct-examination by Mr. Nesbitt:

Q. What is your business, Mr. Woodbridge? A. I am a sales manager of the Texas Company.

Q. How long have you held that position? A. About ten years.

Q. Is your company engaged in the practice of leasing tanks and pumps through which gasoline is dispensed, at a nominal rental? A. It is.

Q. Mr. Gatchell of your company testified yesterday that deliveries into such leased equipment were made from your refined stations, is that correct? A. That is correct.

Q. Your trucks and tank wagons are sent out from refined stations and make deliveries into these equipments? A. That is correct.

Q. Do you know of any instance where such deliveries are made from your refined stations into such 1790
leased equipments across state lines? A. I cannot recall any such cases.

Q. The equipment which you lease and loan is purchased direct from the manufacturers, is that right? A. It is.

Q. How is it handled upon shipment from the manufacturer? A. Well, in most cases it is shipped into our warehouses and there stored and then when we have a call for an installation it is shipped out to the place of installation and generally installed by our own men.

Q. When received into your storage from the manufacturer is the equipment assembled? A. Not all of 1791
it; that is there are various parts, the pump one part and the tank another and there are foot valves and various fittings all separate.

Q. Can you tell me about how many parts a pump consists of? A. Well, you refer to the pump alone or to the pump and tank, the whole thing?

Q. I am referring to a pump alone? A. Well, I could make a guess. I should say—

Q. Half a dozen? A. Yes, I should say something like half a dozen, perhaps half a dozen, or ten, or something like that.

Q. Those parts are assembled at your storage or are the parts shipped unassembled to the place of installation? A. Well, they are shipped together, I should say they were assembled at storage and shipped together, but they are not put together at the place of storage but they are put together at the place of installation.

Q. Do you have numerous places of storage for such equipment? A. Yes, quite a number.

Q. Have you found the practice of leasing and loaning pumps an economical practice for reaching
1793 the ultimate consumer with your gasoline? A. Well, I should say I have found it economical and, well, rather necessary.

Q. Have you found the practice of leasing and loaning pumps a necessary measure to meet the demands of the trade? A. I have, yes.

Q. Do you believe there would be as many curb pumps installations as there are now had this practice of leasing and loaning not been engaged in? A. No, I am sure there would not have been.

Q. Do you believe that there are too many curb installations of such equipments? A. Well, not from the standpoint of the consumer and not from the stand-
1794 point either of the distribution by the oil companies of the maximum amount of product they wish to distribute.

Q. You aim to reach the ultimate consumer with your product? A. That is the purpose.

Q. And you identify your trade-mark with your product? A. We do. We have on all of our pumps that we have leased or loaned the trade-mark and in the globe that is on the top we also have our trade-mark and our name.

Q. Do you believe if the practice of leasing and loaning equipment at a nominal rental had not been

engaged in that the present facilities for dispensing gasoline to ultimate consumers would be adequate for present trade? A. Well, I do not think it would have been nearly as much and I think it would have put the public to some considerable inconvenience. Now, adequate is a broad word and people might go, if they could not get it in any other way, five or ten miles for gasoline, but when it comes to a matter of convenience I am sure that the facilities would not have been anywhere near as convenient as they are now. 1795

Q. Mr. Woodbridge, through your territory are deliveries of your product made to private garages? A. Yes. 1796

Q. Is it or is it not a fact that deliveries are not as frequently made to private garages now as previously? A. Well, I can only answer that this way, that I think there has been some gradual increase in the number of private garages, but I think the tendency is for the man to use his own equipment less and use the facilities offered by the oil companies and by the garages and all that more, because there is a comparatively small difference between what the private garage owner would pay if delivered to him directly and the amount he would pay through a filling station or a service station or a pump, and at the difference I think he would rather go to the filling station or the pump and get the service that he would get, keep his hands clean and not bother to handle the product himself. 1797

Q. That has cut down the expenses of delivery, too, has it, on the part of the company? A. Of course the delivery generally is very much larger to the pump or to the filling station or that sort of service than it is to private consumer.

Q. Trips are not as frequent? A. Trips are not as frequent and the deliveries are larger to the filling stations and that of course is more economical.

1798 *Charles E. Woodbridge, Cross*

By Mr. Speer:

Q. Has this frequent establishment of pumping stations relieved the man of limited means with a small garage of the necessity of putting in average facility? That is, can he rely on the filling station and as a result does not go to the expense of equipping himself? A. I should think it relieved him entirely. The amount he pays in addition for services at a station is so small, it has relieved him entirely of the necessity of providing the service himself. In other words, other people have provided the service which
1799 if they did not provide he would have to provide himself.

Q. He does not have to go to the expense of putting the storage in his garage? A. Yes.

CROSS-EXAMINATION by Mr. Zechiel:

Q. What company are you with? A. The Texas Company.

Q. How much less efficient do you think as to number of installations, point of service, would the whole gasoline industry be in if there had been no leasing or loaning of tanks and pumps? A. You know that is
1800 a kind of a guess.

Q. Yes? A. It is one of those things that has been done by the oil companies and as a natural extension of their business and it is pretty hard to say what would happen if they had not gone into it.

Q. You did testify though on direct-examination, I do not know just what your language was— A. That it would be less, but it is pretty hard to say how much less. I think it would be considerably less.

Q. Considerably loss you say? A. Yes.

Q. Could you transpose that "considerably" into percentages? A. Well, I do not think I could exactly.

Q. Your company does not sell equipments at all as a practice, does it? A. No, not as a practice. We did a number of years ago for a very short period and I do not think we have done that for a matter of five, six or seven years.

Q. And I believe about sixty to sixty-five per cent of your business is done through leased or loaned equipment, with the retail trade? A. I should think about that.

Mr. Zechiel: Is it a matter of record as to how these pumps are bought?

Mr. Nesbitt: I think Mr. Gatchell testified 180
on that point, that we bought them direct. I asked Mr. Woodbridge that a moment ago. We buy them direct from the manufacturer and ship them into storage.

Mr. Speer: And later he said as I recall it, that there was an understanding that they were not to sell them, while there was not any contract to that effect.

Mr. Nesbitt: Mr. Gatchell gave some testimony to that effect.

Mr. Speer: We might as well have that established, though.

By Mr. Zechiel: 180

Q. Where is your territory? A. That I am handling?

Q. Yes? A. It covers all the territory on the Atlantic seaboard north of South Carolina—

Q. Is it the same territory as Mr. Gatchel's? A. Mr. Gatchell is my assistant and it would be the same territory.

Mr. Zechiel: I was in hopes you would put somebody on about the southern territory.

1804 *Charles E. Woodbridge, Cross*

Mr. Nesbitt: Mr. Woodbridge may be able to give you some information.

Q. Do you know anything about your southern territory? A. I know very little about it in the matter of detail, but if you want to ask any questions I will be glad to answer them so far as I can.

Q. Do you know whether your company is engaged in the practice down there or not? A. Well, we are at all, that is we are doing to some extent. I know that as a matter of knowledge.

1805 Q. Do you know whether or not it is to as large an extent as here in this territory? A. Well, that I could not say, but the general impression is not to quite as large an extent.

Q. Do you know why it is not generally the practice there as it is here? A. No, I really don't know, as perhaps my impression is wrong about the extent of it.

Q. I think you are right about the extent, but I was particularly anxious about the why.

Mr. Nesbitt: It is not quite as popular down there as here.

The Witness: That is one reason.

1806 (Witness excused.)

Mr. Zechiel: I want to say, Mr. Examiner, that there have been at times all through this hearing more or less reference to the Bowser Company and their distribution of pumps, and much of the evidence by implication goes to the effect that the Bowser people are responsible for these complaints and this whole investigation. Whether they want to be responsible or whether they do not is wholly their own personal affair, but the fact is that that company is not responsible for these investiga-

tions. Practically all of this last phase of it was 1807
on my own suggestion to the Commission, for the reason that I thought every company ought to be treated alike.

So far as the initiation is concerned, this whole investigation was initiated and I think even the evidence in this case goes to show, by certain oil companies in the west, competitors of the Standard Oil Company of Indiana. And Docket No. 85, the Standard Oil Company of Indiana docket number, which was the first order to cease and desist which was issued, was docketed I think some three or four years ago, early in the history of the Federal Trade Com- 1808
mission, and a long time—I do not think the Bowser Company knew there was a Federal Trade Commission at that time; at least it was before they had anything to do with any complaint of any kind. I merely make that statement because of numerous things that have came out on the record that would seem to implicate the Bowser Company as being the beginners of this investigation.

Examiner Dunham: Is this the last witness.

Mr. Zechiel: I understand it is the last witness.

Mr. Nesbitt: It is our last witness. 1809

Mr. Speer: I do not believe I will take time to call any more.

Mr. Zechiel: I was going to say we are going to adjourn *sine die* and probably we may have a hearing in Washington and if you care at that time to bring other witnesses you may.

Mr. Nesbitt: Are you going to have a hearing?

Mr. Zechiel: It looks as if we will, but we will adjourn that way. Let the record show that thirty days after the receipt of the com-

1810 plete transcript of the evidence by the respondents and the Commission the briefs on behalf of the respondents will be due and also on behalf of the Commission.

Mr. Speer: There having been testimony taken in a number of cases of the Federal Trade Commission against a number of oil companies in cases where the charges were the same as in the cases now being heard and testimony in those cases was taken at Columbus, Ohio, from the 27th to the 29th of October, at which hearing and taking of testimony counsel for the Federal Trade Commission were present
1811 and produced and examined the witnesses and the respondents, while different from the present respondents, were represented and cross-examined the witnesses. I therefore ask that the testimony so taken be considered a part of the record in this case with the same effect as if it had been taken in these present cases, and I ask the consent of counsel for the Commission to that proposition. I ask your consent that it be offered in evidence.

Mr. Zechiel: I cannot consent to it, and I also want to oppose offering that testimony for the reason that it is not so, that the facts in that
1812 territory are in any way related to the facts in this particular territory and that the evidence so taken is irrelevant and immaterial.

Mr. Speer: Then I move the Honorable Examiner that that testimony taken in those cases be considered as a part of the record in this case.

Examiner Dunham: Do you want me to pass upon it?

Mr. Burdeau: Before you do I want to point out this, that Judge Speer is speaking for the Standard Oil of New York.

Mr. Nesbitt: No, the motion is made as I 1813
understand it on behalf of all the respondents.

Mr. Burdeau: Just a minute. All who are here perhaps join with Judge Speer, but there were seven or eight companies summoned to appear at this hearing who were not present and represented by counsel, and they might very much oppose having the record include the testimony taken in Ohio.

Mr. Nesbitt: They will have to look after themselves. Let it be considered on behalf of those present.

Mr. Burdeau: If the motion is made on behalf of those present represented by counsel— 1814

Mr. Speer: Let me state it is in behalf of the Standard Oil of New York, the Texas Company and the Atlantic Refining Company and the Standard Oil Company of New Jersey, I presume?

Mr. Hayes: It is immaterial to me.

Mr. Burdeau: I would suggest that the Examiner defer the ruling of the Commission and let the record show the motion made and let the Commisison pass upon it.

Examiner Dunham: I think I would be an improper person to pass upon it for the reason I am only here as a substitute to hear this 1815
proof and Mr. McCorkle who has acted in all these cases knows about the facts in the previous hearing and could pass upon it much more intelligently than I could and I think he is the man, if an examiner should decide that question at all.

Mr. Burdeau: Moreover, this amounts to a consolidation of these two groups of cases, practically, and it requires a resolution of the Commission to consolidate any cases.

1816 *Exhibit No. 2*

Examiner Dunham: You will all have notice of what my ruling is before you file your briefs.

Mr. Speer: Counsel for the said companies, this motion not being granted, will give notice that it will be renewed before the Commission.

Whereupon at 4:45 P. M. the hearing was adjourned without date.

1817

Exhibit 2.

THE UNITED STATES OF AMERICA,

BEFORE THE FEDERAL TRADE COMMISSION,

Washington, D. C.

FEDERAL TRADE COMMISSION vs. MALONEY OIL & MFG. COMPANY.	Docket No. 309.

1818

Notice of Taking of Testimony.

Please take notice that testimony in the above entitled cause will be taken before George McCorkle, an Examiner of the Federal Trade Commission on behalf of the Commission and Respondent in the City of New York, State of New York, in the offices of the Federal Trade Commission, 20 West 38th St., on the

Exhibit No. 2 1819

20th day of November, 1919, at 10 o'clock in the forenoon of that day.

(Signed) CLAUDE R. PORTER,
Chief Counsel for
Federal Trade Commission.

Acknowledgment is hereby made of the receipt of the above notice, dated day of , 1919.

Attorney for Respondent.

1820

November 10th, 1919.

Mr. James M. Collins, General Mgr.,
Maloney Oil & Manufacturing Company,
Scranton, Pa.

Gentlemen:

Enclosed is notice of the taking of testimony on behalf of the Commission and Respondent. The Commission has issued an order combining the following cases in one hearing for the purpose of taking testimony only:

1821

Atlantic Refining Company,
Standard Oil Company of New Jersey,
Maloney Oil & Manufacturing Company,
Red "C" Oil Manufacturing Company,
Harris & Company, Elmer E.,
Suor Oil Products Corporation,
Pavania Oil Company,
Standard Oil Company of New York,
Kendall Refining Company,
American Oil Company,

1822 *Notice of Final Hearing*

Gulf Refining Company,
Sterling Oil Corporation.

Will you kindly sign the notices and return the original to me at Washington, D. C.? The copy you may keep for your files.

Very truly yours,
FEDERAL TRADE COMMISSION,
CLAUDE R. PORTER,
Chief Counsel.

1823

1824

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 637.

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

STANDARD OIL COMPANY (NEW JERSEY).

No. 638.

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

GULF REFINING CO.

No. 639.

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

MALONEY OIL MANUFACTURING CO.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

VOLUME III.

PETITIONS FOR WRITS FILED OCTOBER 5, 1922.
WRITS OF CERTIORARI AND RETURN FILED JANUARY 12, 1923.

(29187, 29188, 29189)

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BEFORE THE FEDERAL TRADE COMMISSION.

FEDERAL TRADE COMMISSION, Complainant, vs. THOMAS K. BRUSHART, Defendant.	Docket No. 305.

FEDERAL TRADE COMMISSION, Complainant, vs. THE OHIO CITIES GAS COMPANY, Defendant.	Docket No. 308.

FEDERAL TRADE COMMISSION, Complainant, vs. THE WHITE STAR OIL COMPANY, Defendant.	Docket No. 317.

FEDERAL TRADE COMMISSION, Complainant, vs. THE PARAGON REFINING OIL COMPANY, Defendant.	Docket No. 318.

4 *Proceedings*

FEDERAL TRADE COMMISSION, Complainant, vs. THE HICKOK PRODUCING COMPANY, Defendant.	Docket No. 319.
FEDERAL TRADE COMMISSION, Complainant, vs. THE COLUMBUS OIL COMPANY, Defendant.	Docket No. 321.
FEDERAL TRADE COMMISSION, Complainant, vs. CARBONLESS OIL COMPANY, Defendant.	Docket No. 322.
FEDERAL TRADE COMMISSION, Complainant, vs. THE CANFIELD OIL COMPANY, Defendant.	Docket No. 323.
FEDERAL TRADE COMMISSION, Complainant, vs. THE FACTORY OIL COMPANY, Defendant.	Docket No. 324.

FEDERAL TRADE COMMISSION,
Complainant,
vs.
THE INDEPENDENT DISTRIBUTING COMPANY,
Defendant.
Docket No. 326.

FEDERAL TRADE COMMISSION,
Complainant,
vs.
THE LILY WHITE OIL COMPANY,
Defendant.
Docket No. 327. 8

FEDERAL TRADE COMMISSION,
Complainant,
vs.
THE LUBRIC OIL COMPANY,
Defendant.
Docket No. 329.

FEDERAL TRADE COMMISSION,
Complainant,
vs.
THE REFINERS' OIL COMPANY,
Defendant.
Docket No. 9

FEDERAL TRADE COMMISSION,
Complainant,
vs.
THE STANDARD OIL COMPANY OF OHIO,
Defendant.
Docket No.

10 *Proceedings*

11

District Court Room, Federal Building,
Columbus, Ohio, October 28, 1919,
10:00 o'clock A. M.

Before: George McCorkle, Examiner.

Met pursuant to notice.

Appearances:

Chester L. Zechiel, Washington, D. C., appearing
12 for complainant.

Thomas K. Brushart, 1501 Gallia St., Portsmouth, Ohio, on his own behalf.

Herbert M. Meyers, 246 North High St., Columbus, Ohio, on behalf of the Ohio Cities Gas Company.

Don Risinger, Eaton, Ohio, on behalf of the White Star Oil Company.

C. D. Chamberliin, Guardian Bldg., Cleveland, Ohio, and Ira C. Taber, Nicholas Bldg., Toledo, Ohio, on behalf of the Paragon Refining Company.

Proceedings 13

Franklin Rubrecht, 22 West Gay St., Columbus, Ohio, on behalf of the Columbus Oil Company.

A. S. Hickok, president and treasurer of the Hickok Producing Company.

E. T. Lippincott, Lima, Ohio, on behalf of the Lily White Oil Company and the Carbonless Oil Company.

Ralph E. Westfall, Columbus Savings & Trust Bldg., Columbus, Ohio, on behalf of the Independent Distributing Company.

Carl B. Ford, Williamson Bldg., Cleveland, Ohio, on behalf of the Lubric Oil Company. 14

Stewart L. Tatum, Gotwald Bldg., Springfield, Ohio, on behalf of the Refiners' Oil Company of Dayton.

W. H. Holliday, East Ohio Gas Bldg., Cleveland, Ohio, on behalf of the Standard Oil Company of Ohio.

Judge C. D. Chamberlin, Guardian Bldg., Cleveland, Ohio, on behalf of the Canfield Oil Company

Proceedings.

Examiner McCorkle: I will call all the cases in which the respondents have been notified of 15
this hearing at this time and place: Federal Trade Commission vs. Thomas K. Brushart, Docket No. 305; who appears for Thomas K. Brushart? Federal Trade Commission vs. The Ohio Cities Gas Company, Docket No. 308; who appears for the Ohio Cities Gas Company?

Mr. Mayers: Herbert M. Mayers.

Examiner McCorkle: Federal Trade Commission vs. The White Star Oil Company, Docket No. 317?

16

Proceedings

Mr. Risinger: Don Risinger.

Examiner McCorkle: Federal Trade Commission vs. The Paragon Refining Company, Docket No. 318?

Judge Chamberlin: Ira C. Taber and C. D. Chamberlin on behalf of the Paragon Refining Company.

Examiner McCorkle: Docket No. 319, Federal Trade Commission vs. The Hickok Producing Company?

17 Mr. Taber: They are represented by Denman, Kirkbright, Wilson and Florey, of Toledo.

Examiner McCorkle: Federal Trade Commission vs. The Columbus Oil Company, Docket No. 321?

Mr. Rubrecht: Franklin Rubrecht.

Examiner McCorkle: Federal Trade Commission vs. The Carbonless Oil Company, Docket No. 322? Federal Trade Commission vs. The Canfield Oil Company, Docket No. 323?

Judge Chamberlin: C. D. Chamberlin.

Examiner McCorkle: Federal Trade Commission vs. The Factory Oil Company, Docket No. 324?

18 Mr. Holliday: They are represented by Mr. Huber, of Akron.

Examiner McCorkle: The Independent Distributing Company?

Mr. Westfall: Ralph E. Westfall.

Examiner McCorkle: Federal Trade Commission vs. The Lily White Oil Company, No. 327?

Mr. Mikesell: O. F. Mikesell. Mr. Lippincott is the attorney for the Lily White Oil Company, and Carbonless Oil Company.

19

Examiner McCorkle: Federal Trade Commission vs. The Lubric Oil Company, Docket No. 329?

Mr. Ford: Carl B. Ford.

Examiner McCorkle: Federal Trade Commission vs. The Refiners' Oil Company, Docket No. 329?

Mr. Tatum: Stewart L. Tatum.

Examiner McCorkle: Federal Trade Commission vs. The Standard Oil Company?

Mr. Holliday: W. H. Holliday, of Cleveland.

20

Examiner McCorkle: Mr. Zechiel, what case do you wish to take up first?

Mr. Zechiel: Mr. Examiner, may I inquire what other companies besides the Columbus Oil Company have filed answers this morning?

Examiner McCorkle: The Canfield Oil Company and the Paragon Refining Company.

(Ralph E. Westfall filed with the Examiner the answer of the Independent Distributing Company.)

Mr. Zechiel: Does any one represent the Carbonless Oil Company and the Lily White Oil Company?

21

Mr. Mikesell: I have not been subpoenaed for either company, but I am here to represent the Lily White and the Carbonless.

Mr. Zechiel: Mr. Mikesell, neither the Lily White Company nor the Carbonless Oil Company have filed an answer.

Mr. Mikesell: Both.

Mr. Zechiel: They have filed answers?

Mr. Mikesell: Yes.

Mr. Zechiel: How long since?

Mr. Mikesell: I think it was in June.

Mr. Zechiel: It is very strange. Our record does not show any answer filed. I sent a telegram to Washington just a day or two ago asking them whether you had filed answers.

Mr. Mikesell: We have, I know.

Mr. Zechiel: I don't believe these complaints were issued in June.

Mr. McCorkle: Perhaps he does not understand your inquiry.

Mr. Zechiel: I think, Mr. Mikesell, there must be some mistake about that because while I do not know exactly the date of this complaint, I think it is sometime in July.

Mr. Mikesell: Possibly it may be. I wouldn't say positive, to June. It may be it was in the forepart of July.

Mr. Zechiel: Do I understand that you merely answered that original communication signed by the secretary of the Federal Trade Commission and sent to various companies, or did you answer the formal complaint sent out?

Mr. Mikesell: The formal complaint, and acknowledged the communication.

Mr. Zechiel: I don't understand that. Our records do not show it. Do you have a copy of that answer, Mr. Mikesell?

Mr. Mikesell: No, I haven't with me.

Mr. Zechiel: Could you get a copy here very shortly?

Mr. Mikesell: I can 'phone for it and get it here possibly in a day or so.

Mr. Zechiel: If the Examiner please, I want to make a motion first of all to combine these fifteen cases, the Ohio Cities Gas Company, the Hickok Producing Company, the White Star

Oil Company, the Factory Oil Company, the Lubric Oil Company, Thomas K. Brushart, doing business under the firm and trade name of Motor Fuel and Lubricating Company, the Independent Distributing Company, the Canfield Oil Company, the Paragon Refining Company, the Columbus Oil Company, the Carbonless Oil Company, the Lily White Oil Company, Incorporated, the Refiners' Oil Company, and the Standard Oil Company of Ohio, the Springfield Oil Products Company. I am asking that these cases be joined and combined for the purpose of taking the testimony in the cases and in order to expedite matters. I should judge that 80 per cent of the evidence will go to the entire subject-matter and will be pertinent to each case. It has been suggested that perhaps we could eliminate the rest of the 20 per cent through what answers that have been filed admitting practices or by stipulation and thus avoid encumbering the record with evidence along that line, so that practically all of the evidence on the record would go to the entire question involved in each of the fifteen cases.

Whereupon, after further discussion of the matter of stipulation, at 11 o'clock A. M., a recess was taken until 2 o'clock P. M. for the purpose of enabling counsel to prepare stipulations as above noted.

After recess.

2 P. M.

Examiner McCorkle: We are ready to proceed, gentlemen. You have a motion here, Mr. Zechiel, to consolidate these cases.

Mr. Zechiel: I made a motion to that effect this morning.

Examiner McCorkle: For the purpose of taking testimony?

Mr. Zechiel: For the purpose of taking testimony only. I don't know whether there is any further opposition to that motion or not.

Mr. Taber: May we suggest that in the case of the Springfield Oil Products Company, perhaps we ought not to be included in that by virtue of the provisions of our answer as to agency contracts. Our record ought not to be encumbered by what pertains to the others.

Mr. Zechiel: That is true. I think I will modify that motion to exclude the Springfield Oil Products Company, Docket No. 328.

Examiner McCorkle: That motion is granted. You may proceed.

Mr. Zechiel: I think perhaps under pressure this morning I allowed something to be said that might be confusing in this stipulation of the Lubric Oil Company. I don't think Mr. Ford would want it to read that way, but my impression is that after having set forth the facts with respect to jurisdiction, I conceded that it might be said that the company which Mr. Ford represented was not engaged in selling or buying these products or devices, and also that in doing so the products or devices were not moved by them across from one state to another. I think I said that, although obviously having described the manner in which they buy their pumps, if that is interstate commerce, I didn't mean to exclude it by my subsequent concession. I think that portion ought to be amended and supplemented by the ex-

pression, "except as otherwise herein described." I want to say that now so that no one else in following that form would be likely to make the same mistake.

Examiner McCorkle: Are you ready to call your witness, or do you want to wait?

(The testimony was then taken applying to the case of the Springfield Oil Products Company, Docket No. 328.)

W. E. TALBOT was thereupon called as a witness, 32
and being first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Mr. Zechiel: I would like to have the record show, Mr. Examiner, that Mr. W. E. Talbot is appearing in answer to the subpoena of R. S. King of the Refiners' Oil Company of Dayton, Ohio.

I am also saying this generally for the benefit of all the witnesses who have been subpoenaed; if you will leave your distance traveled, actual distance traveled, showing the city from which you were subpoenaed, with the 33
Examiner at the close of your testimony or sometime before leaving, your per diem will be taken care of in that way.

Q. Mr. Talbot, where is your home? A. Dayton, Ohio.

Q. With whom are you connected? A. The Refiners' Oil Company.

Q. Where are your Headquarters? A. At Dayton.

Q. What position do you occupy with respect to that company? A. Treasurer and general manager.

Q. As treasurer are you acquainted generally with the business of the company? A. Yes, sir.

34 *W. E. Talbot, Direct*

Q. Do you have information concerning the extent, the territorial extent over which they do business? A. I have.

Q. What is their territorial extent in the business of selling refined oil and its products and gasoline? A. The State of Ohio exclusively.

Q. Do you sell throughout the state of Ohio? A. We sell south of Columbus, the southern part of the state.

Q. Generally south of the city of Columbus? A. Yes, sir.

35 Q. Throughout the southern portion of the state? A. Yes, sir, generally.

Q. Who are your competitors? A. Do you want them all?

Q. I would like to have a list of them. A. The Standard Oil Company, the Indian Refinery, the Ohio Cities Gas, the Moore Oil Refining Company, Cincinnati Oil Works, Paragon Refining Company, Merchants' Oil Works, Kentucky Independence, Springfield Oil Products Company, Xenia Oil Company, the Columbus Oil Company, and the Gerkins Oil Company. That is as far as I know. I do not know of any more.

36 Q. Are you in competition with the Valvolene Oil Company? A. The Valvolene Oil Company I understand work on a lubricating basis. We are on gasoline and light oils.

Q. Doesn't the Valvolene Oil Company sell gasoline in the State of Ohio? A. Not in our district, that I know of.

Q. Are you also engaged in the business of selling or leasing or loaning oil tanks and pumps used for filling, storing and handling gasoline? A. Yes, sir: we are.

Q. Do you both sell and loan these devices? A. We do.

Q. In your competition in that selling and leasing and loaning of tanks and pumps, do you sell or lease and loan—or rather, you say you do handle them, including selling and leasing and loaning—in competition with any pump manufacturers? A. No, we do not.

Q. Do you know whether or not there are any pump manufacturers who sell pumps in your territory, other than to you or your company? A. Yes, sir; I do.

Q. What companies? A. The Bowser, the Wayne, Gilbert & Barker, the Milwaukee Tank Works, and 38
i think there are three other visible pumps, the Raymond Pump Company of Michigan and the Pittsburgh Visible and one from Kentucky.

Q. You mean to say they all sell in the same territory generally in which you either sell, lease or loan your tanks and pumps? A. They have sold.

Q. Do they now? A. They do, yes.

Q. In leasing your pumps or loaning your pumps, do you loan them to all of your customers? A. No, we do not.

Q. Who make application? A. No, we do not.

Q. Under what circumstances do you make such a loan? A. We did not start loaning until about a 39
year ago. Everything was an outright sale with a margin.

Q. What was the occasion of your starting the loan proposition? A. To meet competition.

Q. By that, what do you mean? A. Other companies were loaning and taking our customers from us.

Q. You mean that you actually lost customers because some competitor leased or loaned an oil tank and pump to one of your customers? A. I do.

Q. Can you make an estimate of approximately the number of customers you lost because of that sort of competition? A. I would say off-hand nothing short of fifty.

Q. And in each of those cases do you know whether or not the customers had been given or leased or loaned an oil tank and pump by a competitor? A. I do.

Q. Do you know whether or not those customers paid a reasonable consideration for the lease or loan of these devices? A. I know that they did not.

Q. Your answer would be that these customers whom you say you lost in this manner, received the loan of oil tanks and pumps for a mere nominal consideration? A. I do.

Q. In connection with your business you have had occasion to travel about over the territory in which you do business, have you? A. I have.

Q. In that respect have you had occasion to visit the particular places of sale of gasoline products? A. I have.

Q. What is your general experience in that connection; do garage men and grocery men and in general the retailers of gasoline products have at the same time more than one oil tank and pump established on their place of business? A. As a rule no, but quite a few of them have. If you wish—one concern in particular has a tank of one company, and they will have a tank of another company, one on one side of the drive and one on the other.

Q. Did you ever know one of these companies to have more than two tanks of competing oil companies at the same time? A. Not to my knowledge, no.

Q. You do not know of any such case? A. I do not know of any such case.

Q. What has been your experience with respect to the sale of gasoline products? Have these customers of yours and other people with whom you are generally acquainted been engaged in the sale of more than one company's gasoline at the same time? A. Not as a rule, providing the pump belongs to another company.

Q. Yes, I am referring to that. A. Yes. If the pump is his own pump, he buys from all companies.

Q. So that where pumps are leased and loaned by all companies to retailers of gasoline, the retailers, as a general rule, handle only the gasoline of the 44
company leasing or loaning the pump? A. As a general rule they do.

Q. Now, where retailers own their own outfits, what is the general practice? A. That generally depends upon the service of the company. In some case they will buy half from one company and half from another. And in other cases they may buy exclusively from one company for say a year or six months or maybe two or three years, but they are at liberty to buy from where they choose.

Q. Do you know what is the occasion of their changing from one company to another in the purchase of their gasoline products? A. For various 45
reasons; quality of the goods or from the service or from some disagreement they may have either with the salesman or a truck driver or perhaps with one of the men of the company.

Q. From your experience in the sale and distribution of gasoline and the handling of these pumps, do you believe that the leasing and loaning of oil tanks and pumps for a nominal consideration and the tying of contracts is a good business practice? A. I do not.

The Examiner: Do any of you gentlemen desire to ask any questions?

46 *W. E. Talbot, Cross*

CROSS-EXAMINATION by Mr. Myers:

Q. How do you know that these pumps and tanks were loaned without consideration to these customers of yours? A. I have heard it from the customers and I have seen the contracts.

Q. You have seen the contracts? A. I have.

CROSS-EXAMINATION by Judge Chamberlin:

Q. You say you have come in competition with
47 the Paragon Refining Company? A. Yes, sir.

Q. At what point did you come in competition with them? A. In the City of Cincinnati.

Q. Do you have service stations in the City of Cincinnati? A. We have.

Q. Do you have leasing outfits, pumps? A. I think we have two.

Q. Has the Paragon Refining Company ever been in active competition with your customers so that they have deprived you of your market? A. On gasoline, no.

Q. Have you any pump in Cincinnati? A. We have.

48 Q. Where is it located? A. We have them located in various parts.

Q. You said you had two pumps in Cincinnati? A. Well, we have perhaps a dozen pumps in Cincinnati, including the ones we have sold.

Q. That you have sold? A. That we have sold.

Q. Those are not your pumps, are they? A. No, they are not now.

Q. Did you sell them with any agreement or understanding with the customer when the pumps were sold that they could use only your gasoline? A. Not on the sales, no.

49

Q. Is that true with reference to any of the pumps that you have furnished customers that have been taken away from you; did you have any agreements with them by which they were to buy from you? A. That have been taken away from us?

Q. Yes. A. No, they wouldn't if they had gone away from us.

Q. I say that they did take from you? A. You say did we have that agreement? No, we did not.

Q. The reason they were taken away from you was the ordinary competition in business? A. For the reason that someone else would put in a pump and we would not on a loan proposition.

50

Q. But you have put in pumps? A. No, we hadn't in any particular case that you are speaking about. That is why we lost the business.

Q. I understood your direct testimony to be that you had been leasing at a nominal consideration and furnishing at a nominal consideration, pumps for the sale of your own product? A. We have in some cases.

Q. Have any of those pumps been taken away by any other firm's competition? A. I don't recall, but I think one or two have been taken out and replaced by another company on the same basis that we had ours in.

51

Q. The customer didn't gain anything, then, did he? You would not have any complaint against that? A. He gained a five-gallon pump instead of a one-gallon pump.

Q. If you had furnished the five-gallon would you have retained the customer? A. We would have retained the customer.

Q. And you would have furnished the five upon the same basis as you would have furnished the one? A. We would if we had felt it advisable.

52 *W. E. Talbot, Cross*

Q. Isn't it a fact that these customers you have lost have been lost to you as you stated, by reason of difference in service or other trade considerations other than the furnishing of the pump? A. Why, not altogether, no.

Q. But they have in part, have they not? A. We have lost—I think every company has lost some customers for various reasons, perhaps of salesmanship, but I do say we have lost a number of customers on this pump business and that is the reason that started it.

53 Q. That is the reason you— A. That is the reason we started it about a year ago, leasing and loaning and we have about 12 or 15 out in all.

Q. Why don't you think it is a good business practice, Mr. Talbot, to furnish the pump for the purpose of getting a customer for your gas? A. I don't think it is either good for ourselves or anyone else. It is monopolizing that particular customer.

Q. Every time you sell a customer you monopolize him as to that sale? A. You don't monopolize him as to his future business.

Q. Are your contracts or your understandings with your customers such that they would not be permitted
54 to handle anybody else's gas through a similar installation furnished by your competitors? A. Do you mean to say that he could put another pump on the same property along with ours and handle competitor's goods?

Q. Yes. A. He could, the same as he could in any other contract that was drawn.

Q. Is there anything unfair about that? A. Why, it is unfair to a pump company if you put in two pumps on a property that you will put out a hundred gallons or less.

55

Q. That is, it enables the company to sell two, where otherwise they would only have sold one? A. No, they won't sell two.

CROSS-EXAMINATION by Mr. Tatum:

Q. I just wanted to ask one question. Where are the pumps of the Paragon Refining Company in Cincinnati that you came in competition with? A. When I gave the Paragon Refining Company—as I remember, Mr. Zechiel asked me our competitors. They are competitors of lubricating oils. I don't know that we have ever run against them on light oils or gasoline.

56

Q. So that so far as gasoline is concerned, you meet in competition with them? A. With the Paragon Refining?

Q. Yes. A. Whether they have tanks, I don't know.

Q. Within your district you have never found one of their tanks or pumps? A. Not to my knowledge, no.

Q. Just one other question for the record. You have never come in competition with the Canfield Oil Company, have you, in Cleveland? A. No, we haven't.

57

Q. So that nothing you have said applies to the Canfield Oil Company? A. Absolutely not.

CROSS-EXAMINATION by Mr. Holliday:

Q. Mr. Talbot, you testified some few customers were taken away from you by reason of competitors putting in leased or loaned outfits. Prior to that time had these customers whose patronage you enjoyed owned their own pumps? A. They had been.

58 *W. E. Talbot, Cross*

Q. And you had been enjoying their trade continuously before that, although they owned their own pumps? A. Not exclusively, no; but we had been enjoying part of it.

Q. Isn't it a fact that the retailer usually continues to buy regularly from one particular wholesaler so long as the service and the quality of goods continues to satisfy him? A. Not frequently, no.

Q. Would it have been any different in the result to you if those customers, part of whose patronage you had enjoyed, had been taken away from you by
59 their company being appointed the agent of some wholesaler instead of having an outfit leased to them? A. Will you kindly repeat that question?

(Question read.)

A. No, I don't say that it would.

Q. So that so far as practical results are concerned, the appointment of a retailer as agent of a wholesaler is exactly the same as the leasing or loaning to him of an outfit for a nominal consideration, is it not? A. That is something I don't know; I wouldn't know. I would like to know what an agent
60 is.

Q. Assuming that that competitor, instead of putting in the tank and loaning it to him for a dollar a year or for no charge, had appointed the retailer his agent, put the gasoline into the tank for him, the retailer to be paid, say one cent a gallon or a commission on the sales that he made; would not that have the same effect on your business as the lease or loan? A. Providing the wholesaler owned the equipment, I would say yes.

Q. Do you advertise your gasoline? A. We do.

Q. How long have you been advertising your gasoline? A. Ever since we have been in business.

Q. Do you have a trade name for your gasoline? A. We do.

Q. What do you call it? A. High Speed.

Q. You consider that that is a valuable asset to your business to have a trade name for your gasoline? A. We do.

Q. How is it possible for a wholesaler or a jobber to identify his gasoline by a trade name when it is handled by a retailer unless he does make that retailer his agent or leases or loans him the tank over which the wholesaler has control? A. He could do it perhaps by advertising two grades of gasoline, handling one grade one month and another grade another. 62

Q. Would that advertise your High Speed trade name? A. Partly, yes.

Q. By advertising two brands? A. Why, they would both be advertised.

Q. As a matter of fact, you do not advertise two trade names, do you, for gasoline? A. No, we do not.

Q. Where a retailer owns his own equipment, he doesn't put any High Speed sign or electric device over the pump, does he? A. In quite a few cases, yes, in a number of cases, yes. 63

Q. But in a great many cases it is a fact that the retailer won't do that? A. It is about half and half as we have found it.

Q. All right, 50 per cent, then. So that as to the 50 per cent that refused to put your sign on the pump you get no credit for selling to the consumer your High Speed gasoline, do you? A. He doesn't have any sign?

Q. No. A. For the reason that he handles in that case perhaps three or four grades of gasoline, or perhaps only two.

64 *W. E. Talbot, Cross*

Q. Now suppose that one of your customers who owns his own pump does put your sign on the pump as you say they do sometimes. You say that in such cases sometimes they buy your gasoline and sometimes somebody else's gasoline. Is it a good promotion of your trade name to have somebody else's inferior gasoline put into that apparatus that bears your trade name? A. They don't do that when they put our trade name on their pumps, so far as I know.

Q. In other words, then, am I to understand you
65 that where the retailer puts your name on his pump he agrees not to put anybody else's gasoline into yours? A. No, he hasn't agreed to, but he doesn't do it.

Q. He doesn't do it? A. And we haven't found any case, to my knowledge, where he did.

Q. But if he did, it would hurt your business, wouldn't it? Have you answered? A. I haven't, no. I really don't know.

Q. Is there any way that a retailer or a wholesaler can identify his trade name of gasoline so that he can guarantee to customers that they will get that advertised brand, except by one of three methods,
66 first, the lease or loan of an outfit; secondly, the appointment of a retailer as an agent, or thirdly, by building and operating his own service station? Is it not a fact that those are the only three methods by which a wholesaler advertising his goods can assure his customers that they will get that advertised brand? A. No, it is not.

Q. You say that there is some other way? A. There is.

Q. What is it? A. To answer that, I have seen cases where pumps are loaned and they are willing to

67

use our brand straight and no one else's; other cases where a man owns his own pump or refuses to handle anyone else's goods but one particular company because he likes the particular brand of gas or that particular gasoline and he then, in most cases, will put a sign up that he is handling that gasoline.

Q. Then as a matter of fact, this leasing or loaning of devices is not the sole cause for a retailer dealing exclusively in one jobber's or wholesaler's gas, is it? A. It is as a rule, because he is bound down to buy their goods.

68

Q. But as a matter of fact aren't there a great many retailers that buy exclusively from one manufacturer or wholesaler for a continuous period of time? A. I wouldn't say for a continuous time. They perhaps will for a year and then perhaps they will switch to another company and put their sign up, like any other man in business.

Q. As a matter of fact, isn't it also your experience that retailers who are operating a loaned or leased outfit will oftentimes or some times change pumps and sell for different people as often as once in a year or two years? A. If that was the case, I see no object in leasing the pump.

69

Q. That sometimes happens, though, doesn't it? A. I have heard it to happen, yes.

Q. Isn't it a fact that the wholesalers do solicit retailers who have a leased pump and get them to put in their pump instead of the one that they already had? A. On a leased outfit I don't know. I can't answer that by saying that we have solicited that class of trade and sold them at times.

Q. And you have also had leased outfits of yours put out and your competitor's pumps put in, haven't you? A. Not to my knowledge, no.

Q. But that does sometimes happen, doesn't it? A. Having another outfit loaned by another company put in?

Q. Yes. A. I have heard that it has, but not with us.

CROSS-EXAMINATION by Mr. Rubrecht:

Q. Mr. Talbot, you said that the Columbus Oil Company was a competitor of yours; where do you meet that competition? A. We meet that in Xenia.
71 That is about the only place—Xenia annd Piqua.

Q. Xenia and Piqua; where is the Columbus Oil Company's station at Piqua? A. They don't have a branch at Piqua, but we meet their competition at Piqua. They drive over from Troy.

Q. Troy is a few miles from Piqua? A. A few miles from Piqua.

Q. You don't meet them right in Piqua, though, do you, from any station there; they have no station in Piqua? A. They have pumps in Piqua.

Q. Pumps there? A. Yes, sir.

Q. They have pumps that they have sold, if I understand it? A. That they have loaned.

72 Q. They have loaned pumps in Piqua? A. That is as I understand it.

Q. How did you get that information? A. I got that direct from one of the customers in Piqua.

Q. They told you that they got it direct from the Columbus Oil Company? A. Yes, sir.

Q. When was it that you got that? A. About three weeks ago.

Q. Well, the Columbus Oil Company has not replaced any pumps that you have installed, have they, for any of your customers? A. No, sir; they haven't.

Q. You say in Piqua the pumps were loaned to them there, or leased? A. So this party told us. I didn't see the pump. 73

Q. You don't know anything about it except by hearsay? A. I do not.

Q. You think it is bad practice for a man to have a trade name or trade-mark for his particular brand of gas and have it possibly above the pump to attract the attention of the public that that trade-mark is the place where you can get that quality of gasoline; you think that is bad practice? A. I do not.

Q. That is, I mean in connection with the loaning of pumps and tanks, you think that is bad practice, do you? A. I think that the loaning of pumps and tanks is bad practice. 74

Q. You think it is bad practice. How are you going to get the distinctive characteristic of your gas if you don't advertise it and call attention to where they can get that particular brand? A. We do advertise.

Q. You do advertise but you do not advertise around the station, do you? A. We do.

Q. You are not in favor of that? A. No, sir.

Q. You are not in favor of the loaning and leasing proposition? A. No, sir; not in favor of the loaning and leasing proposition. 75

Q. You are in favor of every jobber owning his own tank or pump or being appointed an agent? A. I am in favor of every dealer owning his own tank and pump.

Q. His own tank and pump? A. For the reason that he has liberty to buy from where he wishes.

Q. Then, of course, he couldn't keep your sign over his pump, could he, if he owned his own pump and could buy where he pleased? A. No, he could not.

76 *W. E. Talbot, Cross*

Q. Would that reduce the amount of business that you get yourself, the amount you sell, the amount of gas you could sell? A. In that case it would.

Q. Therefore you are cutting off your own nose in doing that, aren't you? A. It is a question if we would lose it if he owned his own tank and pump.

Q. If he owns his own pump and tank he can buy from the Standard or the Columbus Oil Company and ignore you, can't he? A. In that case he would not advertise any particular brand.

77 Q. In any case you would lose? A. We would lose the advertisement but not the business.

Q. Wouldn't you lose the business if there were no attraction or advertisement there to indicate the Refiner's Company's gasoline, wouldn't you lose on that proposition when there was nothing to indicate that it was there? A. We would lose the advertisement.

Q. You would lose the business, too, wouldn't you, by reason of that? A. We would still continue to sell him.

Q. How do you know you would? A. If he is buying from all companies.

78 Q. How? A. If he is buying from all companies in that particular town.

Q. Now, assume here is a pump on the curb, no sign above it indicating that it is Refiner's Oil Company of Dayton, nothing there to indicate what it is, and I come along in an automobile and I am hunting Refiner's oil. I have been used to using it, and I saw nothing on that pump to indicate what oil he has got, do you mean to tell me that I, as a driver of an automobile, would not have some doubt or would not go somewhere else to get the Refiner's oil, call for it some place else? A. I suppose you would.

Q. You would lose that, wouldn't you? A. In that one case.

Q. That is just one illustration of a great many A. Not a great many, no.

Q. What is the value of the advertising on the pump, in your opinion, and the name above in a glass globe? A. If you could get your customer to use your product, I think it is very good.

Q. It has a very good value? A. Yes, sir.

Q. You would prefer having that to being without it? A. Yes, sir; I would.

Q. Now, coming right back to the last analysis; do 80
you not agree that it is a stimulation of business to have a pump with a distinctive sign on it handling a certain kind of gasoline; isn't that a stimulation to business? A. Yes, business as well as the retailers who handle your goods. I don't think the advertisement is any more valuable than perhaps a sign on his garage.

Q. That is valuable, isn't it? A. It is.

Q. Yes. Now, isn't it a stimulation also for the Columbus Oil Company, or the Standard, or the Paragon, in the same town, your town, Dayton, to have a station over which there is a sign, "Paragon Oil," "Standard," "Red Crown," and so on; isn't that a 81
stimulation of business? A. It is.

Q. That is, in competition with your business? A. Yes, sir.

Q. Therefore, there is no restraint of trade if the companies are doing as you have been doing, putting the name over the pump; it is a distinctive brand of gasoline, isn't it? Is there any restraint of trade in that? A. Who owns the pump?

Q. It don't make any difference who owns the pump; I am talking about the advertisement now. A. Why, no, I think it is good.

82 *W. E. Talbot, Cross*

Q. You said a while ago you thought it was bad? A. No, I beg your pardon.

Q. Assuming now, for instance, that the dealer owns the pump, the retailer, the man who is selling it to the automobile driver who comes up with his machine. Suppose he owns the pump outright; he has the absolute title and is in possession of it, but he won't advertise your oil or anyone else's oil. Do you think he will sell as many gallons per day or week without that distinctive advertisement over the pump as he would if he had it above there? A. I know he
83 would in Dayton.

Q. You say the gallons or the gallonage would be just as much per day for the Refiner's Oil Company of Dayton if he did not have the sign up there; is that right? A. It would, because they are not allowed to have signs on pumps.

Q. Who doesn't allow you to have signs on pumps? A. The reason I was asking about that was because you were asking about Dayton. The City of Dayton does not.

Q. Who prohibits signs on gasoline pumps there? A. The commission.

Q. How? A. The commission.

84 Q. What commission? A. The City Commissioners.

Q. What commission; the trade commission? A. A. The City Commissioners.

Q. You have got a commission form of government over there, haven't you? A. Yes, sir.

Q. You have a czar of Dayton and he won't allow you to have a sign over your pump; is that right? A. That is right.

Q. How long has that been in vogue? A. About three years.

85

Q. Well then you are just answering all these questions as to the value of the advertising over the pumps from a purely local standpoint, from the standpoint of Dayton and you have a peculiar form of government in Dayton? A. No, because we do not operate in Dayton only.

Q. You operate in Cincinnati and other cities, don't you? Now eliminate Dayton from your mind. Take that out of it and let us do not consider the commission form of government. Go over to Xenia, or Troy, or wherever you have a station. Do you mean to say there is no value in having the name over the pump, 86 what quality of gasoline it is that company sold? A. No, I do not.

Q. How much value is it? A. I don't know.

Q. Don't you agree that that is the best method of calling the attention of the patron as to where and what kind of gasoline he can get at a given station; isn't it the best method? A. I don't know.

Q. Now I will ask you another question. Isn't it a fact that the average automobile driver does not think about gasoline until it is getting low in the tank and therefore he searches for the kind that he wants and gets it at the nearest place, if he knows where it is; if he knows where the station is of the Refiners' 87 Oil Company he will think about getting that gasoline when he is where he knows it is and he will get it by the name on the pump. A. As a rule they don't pay much attention.

Q. Do you have a sign over your place of business? A. We do.

Q. What kind of a sign? A. We have various signs.

Q. I know, I suppose you have various signs, but do you have electric signs to be read at night? A. We have both.

88 *W. E. Talbot, Cross*

Q. What is the value of that sign to you; does it get you any business at all? A. We think it does.

Q. You think it does; wouldn't the same apply to a pump where there was a sign over it? A. I think that a pump with a sign over it with the words "Filtered gasoline" would mean to the average tourist just as much as any particular brand.

Q. Take your local community, however, where they know about the Refiners' Oil Company having a certain brand or quality of gasoline; do you say it is of no value to have that sign over the pump so that
89 even the residents can know where it is and where it can be found? A. I think it is of value.

Q. You think it is of value; that is what I thought. Now I will ask you, Mr. Talbot, does not that all make for a better volume of trade for your company as an illustration in the sale of gasoline—that method?

Mr. Zechiel: I do not believe "that method" is very clear.

Q. Do you get my question? A. I would like to hear it again.

(Question read.)

90 Q. Isn't it a fact, Mr. Talbot, that the advertisement of a certain quality or brand of gasoline educates not only the public to use that in their automobiles—for instance it has less carbon and more firing power, and doesn't the driver come up and take his chance on getting a medium grade or a high grade of gasoline? Doesn't this advertising stimulate not only the industry of furnishing better gasoline to the public but also the volume of sales and gallonage to the public? A. Yes, I think it does.

Q. Yes, that is what I thought you would say (no reply).

CROSS-EXAMINATION by Mr. Tatum:

Q. Your company has never leased, loaned, sold or worked any oil or gasoline pumps, tanks or containers of oil or gasoline to any persons or corporations except those within the limits of the state of Ohio? A. They have not.

Q. Nor have they sold or delivered any oil or gasoline or other products excepting persons or corporations within the State of Ohio? A. They have not.

Q. The company has never moved any of these products or devices in interstate commerce between any 92
two states or any state and territory? A. They have not.

RE-DIRECT EXAMINATION by Mr. Zechiel:

Q. Do you recall now the names of the companies, these fifty, where your customers have been taken by competing companies under the conditions to which you have testified on direct-examination? A. I don't recall all of them, no.

Q. Do you remember any of the names of any of the companies that took your customers under the circumstances? A. Yes, I do. 93

Q. Enumerate those? A. I don't know just exactly how many I can give you.

Q. Well, whatever you happen to remember. A. The Smiley Transfer Company was one.

Q. That was the name of the customer you lost? A. Yes, sir, that is one of them.

Q. To whom did you lose them? A. I lost that to the Standard Oil.

Q. What others, if you recall any of them? A. I have lost in some other cities that I haven't in mind right now, that I could name.

94 *W. E. Talbot, Re-direct*

Q. Do you know to what companies you lost customers even if you do not recall the details? A. Yes.

Q. Of the transaction; what are those companies to whom you lost customers because of the use of these time contracts and nominal rental for leased pumps, etc.? A. May I ask one question? Is that taking in also these hundred-gallon cabinet tanks, gasoline tanks?

Q. I don't know what a hundred-gallon cabinet tank is.

95 Mr. Holliday: That has nothing to do with this proposition at all.

Mr. Zechiel: What is that tank?

Mr. Holliday: It is above ground.

The Witness: It is generally used in the rural districts.

Mr. Tatum: It is a retailing proposition of a gallon at a time, as a rule.

Mr. Zechiel: Where you delivered it in the hogsett form and it is distributed among the farmers? No, we are not referring to that. No, we are referring to oil tanks and pumps as you generally know them, curbstone pumps

96 The Witness: You want the names of different companies?

Q. Yes, if you recall to whom you lost customers because of this practice as you have described it previously. A. As I remember, there was the Standard and the Kentucky Independent. I really don't remember.

Q. If you don't recollect that is all right. With respect to the agency agreements, is it your opinion that the agency agreement as a competitive method is equally as objectionable as the loan agreement? A. I really don't know; I haven't had enough to do with them.

Q. And how large is your company, the capital invested, the capital stock? A. $400,000.

Q. All paid in? A. No. I think there is a hundred outstanding.

Q. How many pumps and tanks do you have leased or loaned? A. Not over 15; it is 12 or 15.

Q. Do you make it a practice to lease and loan pumps and tanks to customers of yours who are in the habit of buying gasoline from you for a time and then from somebody else and then somebody else and each time installing a different pump of some other company? A. No, we do not. 98

Q. How many people, customers and prospective customers or customers of competing companies, in the territory in which you do business, own their own pumps and how many of them lease pumps in a general way? A. I would say about 50 per cent.

Q. Do you know whether competing companies in your territory are likely to or do as a matter of fact lease and loan oil pumps and tanks to customers who buy for a time from one company and then from another company? What is the trade practice in that respect within the range of your experience? A. The competitors do, yes. 99

Mr. Zechiel: Read that question to see if he understands it.

(Question read.)

A. Yes, they do.

Q. In answer to the attorney for respondent's question as to the advantage of advertising your product by signs on the pumps and tanks, you said that you thought it was some advantage to your company, I believe; am I right? A. You are.

Q. Do you mean to say that that is because of the time contract or the nominal consideration paid for

the pump or tank on which this sign is placed? A. No, I think the sign is placed as it is at the present time on pumps and tanks that are sold outright.

Q. Then the placing of signs and advertisements on top of pumps and tanks, in your opinion, has nothing to do with the leasing or loaning of pumps for a nominal sum on time contracts? A. Absolutely nothing.

RE-CROSS EXAMINATION by Mr. Rubrecht:

Q. You haven't any pumps at Piqua? A. Not as yet; we are just opening.

Q. Then if you come in contact with any other company in Piqua it is because you drive over there from somewhere else, as well as they may drive over to Piqua? A. No, we are operating in Piqua direct.

Q. You drive over there from Troy, do you? A. No, we do not.

Q. How did you get in contact with them in Piqua? A. The Columbus drives over from Troy.

Q. You are not in Piqua; you haven't any stations there? A. We have.

Q. You have? A. Yes, sir.

Q. In Piqua? A. Yes, sir.

Q. How many? A. We have just one branch: we haven't any stations.

Q. One branch? A. Yes, sir.

Q. That is a leasing and loaning proposition? A. No, the property is ours and the tanks are ours. We have trucks.

Q. That is a distributing station? A. It is.

Q. You don't sell from that station? A. Yes, we do.

Q. You retail from that station? A. Not direct. We sell wholesale and retail both from the truck.

Q. You drive out from there, out into the outlying sections? A. It is a distributing point.

Q. That is what it is; it is not what we ordinarily understand as a pumping station, as we ordinarily understand it here? A. No, sir.

Examiner McCorkle: What is your street number in Dayton?

The Witness: 315 South Main.

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L. T. KAMERON was thereupon called as a witness, and having been duly sworn, testified as follows:

By Mr. Zechiel:

Q. What is your name? A. L. T. Kameron.

Q. Where do you live? A. 1909 Dorr Street, Toledo, Ohio.

Q. Mr. Kameron, you are the same Mr. Kameron who was subpoenaed as L. C. Kameron, are you? A. I am.

Q. Where is your home, Mr. Kameron? A. In Toledo, Ohio, 1853 Oakwood. 105

Q. With whom are you connected in business? A. With my father, Mr. J. J. Cameron.

Q. What is your father's business? A. Groceryman and gasoline business.

Q. With respect to his gasoline business, what is the general nature of the business he does? A. Wholesale principally; retails a little out of grocery stores.

Q. What is your position with your father's business? A. I am manager of the gasoline department.

Q. What has been your experience in the gasoline industry? A. Well, I don't know what you would want me to say there.

Q. Just in a general way; what do you know about it; how much experience have you had and what have you been doing? A. I have not had a great deal of experience. I have only been in the business, oh, in the neighborhood of two years.

Q. What is the territorial extent of your experience? A. Within Toledo, not very far outside out of Toledo and not any outside of the state.

Q. Your experience in the City of Toledo has been only within the last two years? A. Within the last two or two and a half years.

107 Q. Do you handle oil tanks and pumps in connection with your business in any way at all? A. We do not make it a practice. The only time we have ever done it was with one exception.

Q. Now, you mention you do not sell oil tanks and pumps to your customers? A. Not unless the customer is not able to get them. In such case we will go to an agent of some oil tank and pump company and let them talk with the agent.

Q. Then you do not sell oil tanks and pumps to your customers? A. With the one exception of tanks. We have sold perhaps two outright.

Q. You also have one tank installed under a lease
108 agreement, have you? A. No, it is not installed. We have a lease or agreement to install it, but as yet it is—we have not furnished any gasoline, and the equipment is not installed yet.

Q. What is your capital investment in the gasoline business? A. Well, offhand I would say about $15,000.

Q. How is that investment distributed in a general way? A. In storage tanks and stock, stocks of gasoline and oils.

Q. Have you ever lost any customers because you refused to lease or loan an oil tank or pump for a nominal consideration? A. None that I can swear to.

109

Q. Have you ever tried to sell to retailers of gasoline who would not buy from you? A. Oh, yes.

Q. Did they ever give you any reason for refusing to buy at that time? A. Yes.

Q. During that time did any customer or any retailer to whom you tried to sell gasoline give as his reason that he was under an agreement or arrangement with a competing oil company, because of which he could not buy from you? A. Yes, a few.

Q. Who are your competitors? A. Well, the Standard Oil, the Hickock Producing Company, the Paragon and the people who sell the Lubric oils.

110

Q. You mean the Lubric Oil Company? A. Who are the people who sell the Lubric oils? The Lubric Oil Company?

Q. Yes, that is right. A. That is all I can recall at present.

Q. You say you have never installed any oil tanks and pumps under these lease contracts? A. No.

Q. That is your reason for not installing those equipments? A. The amount of capital involved in it.

Q. You mean you cannot afford to conduct that kind of business? A. Yes, sir.

111

CROSS-EXAMINATION by Mr. Holliday:

Q. Mr. Kameron, you did not go into the service station business either? A. No, we are not in the service station business excepting at the grocery stores.

Q. Why don't you go into the service station business? A. Capital involved.

Q. As a matter of fact it would take more capital to sell your gas through a service station method of doing business than through the system of leasing or loaning curb outfits, wouldn't it? A. I don't know.

112 *L. T. Kameron, Cross*

Q. Well, if you had to acquire ground and put up a building and build driveways such as they have for service stations, that would take more moneys than buying a simple pump outfit, wouldn't it? A. Yes, but the quantity sold is another question which we do not know anything about, because we have not tried it that way.

Q. It is a self-evident proposition, isn't it? A. No.

Q. That it is cheaper to buy one pump and have all the sales at that one pump than it is to have to buy in addition to the pump a building and make
113 driveways, and acquire land; that is self-evident, isn't it? A. There are other questions involved in that.

Q. But isn't that a self-evident proposition? A. No, it is not to me.

Q. Doesn't a pump cost less than a pump plus the cost of driveway and yard and building? A. Yes, but you sell more at a service station, as I understand, than you will simply at a pump. That is, your capital involved might perhaps sell more product in a service station than it will if you had merely a pump.

Q. That is, assuming that your service station is established in a better location than your curb outfit? A. Yes.

114 Q. Now, assume for the moment, Mr. Kameron, that the Federal Trade Commission should issue an order against all the companies in the State of Ohio, forbidding them to lease or loan pumps for a nominal consideration, and suppose that all of the companies in the State of Ohio should comply with that order and should immediately turn around and make the customers who are now leasing from them their agents, the agents agreeing to sell their principal's gasoline in those same tanks, and be paid a commission for selling, would that present any easier condition or any essentially different condition for you in your business than the present condition? A. I don't know.

115

Q. Well, what do you think about it? A. I have no thought about it. I have not thought about it long enough to give any opinions on it, really. It would be a rather rash statement on my part to give any opinions of that kind.

Q. It would not change that condition in any essential respect, would it? The agents would still be buying all of his gasoline from the particular wholesaler who happened to be his principal, and you would not be any more able to sell gasoline to him then than you are now, would you? A. I don't know.

116

J. L. MARSH, was thereupon called as a witness, and being first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. You may give your name and address? A. J. L. Marsh, 13 Pasadena Avenue, Youngstown, Ohio.

Q. What is your business, Mr. Marsh? A. Oil business.

Q. With what company are you associated? A. The Vahey Oil Company.

Q. What is your position? A. Vice president and 117
general manager.

Q. How long have you been associated with the Vahey Oil Company? A. Since August 1, 1918.

Q. What was your experience, if any, in the gasoline industry prior to that time? A. About twelve years.

Q. What were you doing; what was your business during that twelve years prior to that date? A. Well, I had done a little of everything with the oil business.

Q. Just enumerate it in a general way. A. I was in the refinery, traffic department, accounting depart-

ment, sales department, station department. That is all, I guess.

Q. Now, was all this employment with this same company? A. No, sir.

Q. With what company? A. With the Independent Refining Company and the Texas Company.

Q. How long have you been with this company? A. Since August 1st, 1918.

Q. Was this company organized at that time? A. It had been in operation a good many years prior to that time.

119 Q. What is the capital stock of your company? A. The outstanding capital?

Q. Yes, the outstanding capital, the issued stock? A. $126,000.

Q. What is the general territorial extent over which your company does business? A. Why, principaly northeastern Ohio.

Q. Would you make that a little more definite? A. Our business—

Q. About how far south? A. Our business is confined principally to the Counties of Mahoning and Trumbull and Columbiana.

Q. Who are your competitors? A. In all petro-
120 leum products or just gasoline?

Q. Gasoline products? A. Standard Oil Company, the Texas Oil, the Freedom Oil Works Company. That is about all.

Q. Do you know, in a general way, the respondent companies here in this hearing? A. I know them slightly only.

Q. None of the respondents other than the Standard Oil Company of Ohio are competitors of yours in that territory? A. So far as I know.

Q. They are not? A. They are not.

121

Q. Did I understand you to say you had formerly been employed by the Texas Oil Company? A. Yes, sir.

Q. Are you acquainted with the territorial extent over which the Texas Company operates? A. I was acquainted on August 1st, last year. I would not say that I am now.

Q. What is that territorial extent, generally? A. Do you mean in Ohio?

Q. I am talking about it generally. A. Well, they cover a good part of the United States.

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Q. All of the United States or certain portions of it? A. I don't think that they cover all of the United States.

Q. My question was very poorly phrased. I mean do they occupy most of the territory within a section of the United States, say the Mississippi Valley section, or do they distribute everywhere? A. They cover the eastern and southern sections pretty closely, and some parts of the western, but not so much in the northwest, as I remember it, and some of the central states.

Q. What was your position with the Texas Company? A. Agent at one of their Youngstown stations.

123

Q. Did they at that time transport the gasoline from outside of the State of Ohio into the State of Ohio? A. They did.

Q. And there sell it? A. Yes, sir.

Q. What was the general distribution of their sales at that time, generally, over the State of Ohio or locally? A. As I remember it, Youngstown was the only distributing point they had in Ohio, and their distribution of gasoline was confined almost entirely to the territory immediately surrounding Youngstown.

Q. They had no other station in Ohio? A. I don't think they did.

Q. Does your company deal in gasoline pumps and tanks and containers for gasoline? A. Yes, sir.

Q. Buy and sell them? A. Yes, sir.

Q. Do you lease or loan those? A. No, sir.

Q You make no leases or loans at all to any of your customers? A No, sir.

Q. In a general way, how extensive are your sales of tanks and pumps? A. We do not—we couldn't consider it a business. We simply buy them when
125 we have someone in mind to whom we can sell them. We do not carry them in stock.

Q. About how many a year? A. Oh, I should say perhaps a dozen.

Q. In handling those pumps, you have them shipped to you, do you, from outside of the state? A. Yes, sir; we buy them outside of the state.

Q. Do you have them shipped direct to the customer to whom you sell them? A. No, we bring them into our plant.

Q. Distribute them from there? A. Yes, sir.

Q. Order them for particular customers? A. We generally have an order for one when we buy it.

126 Q. Are you acquainted in the field over which you operate generally with the practice of the distributing trade with respect to the use of oil tanks and pumps? A. I think so.

Q. You travel about over the whole territory more or less? A. Yes, sir.

Q. What is your experience in that respect? Do retailers of gasoline products have more than one oil tank and pump or gasoline pump equipment installed on their premises at the same time? A. More than one pump or tank?

Q. Yes, more than one outfit, tank and pump? A. Some have two.

Q. What is your experience, in a general way: is it the common practice to have more than one, or is it the common practice to have only one? A. It is the common practice to have about one.

Q. Do you know of any instance where they have more than two such equipments? A. I cannot recall any instance.

Q. Now, where they have two such outfits, do such retailers of gasoline buy and sell gasoline of more than one oil company at the same time? A. I do not know of any such case where they sell more than one company's gasoline. 128

Q. That is where they have two installed? You say you do not lease or loan? A. No, sir.

Q. Why don't you lease and loan oil tanks and pumps to your trade? A. Well, it has never been the policy of our company to do that and we have found it more satisfactory in our particular case to sell than to loan.

Q. Have you ever lost customers because you refused to lease or loan a pump? A. Yes, I think I have.

Q. You say you think you have; you don't recall who they are but you are positive you have lost customers? A. I am not positive who they were but I 129 am positive I have lost customers.

Q. Have you ever tried to sell your product to vendors of gasoline who refused to buy of you because they were under time contracts and lease agreements with competitors of yours? A. That is, I understand you to ask if I have been refused by some one, some dealer?

Q. Yes. A. To buy of me because he had some other company's outfit?

Q. Yes, because he had another company's outfit? A. Well, I have been refused on that account.

130 *J. L. Marsh, Cross*

Q. Do you believe the leasing and loaning of oil tanks and pumps is sound business practice? A. I do not feel qualified to make a statement on that because my business is confined entirely to Youngstown.

Q. Well, in the City of Youngstown you say you do not practice it? A. No.

Q. What is the reason why your company does not engage in the leasing and loaning of oil pumps? A. Because we have always found it possible to sell all of those we could serve. Our business has been such
131 that we had about all that we wanted to do and there has never been a case where it has been necessary to get out and hustle for business like in some localities, perhaps.

CROSS-EXAMINATION by Mr. Holliday:

Q. Mr. Marsh, the Texas Oil Company has a bulk storage station at Youngstown? A. Yes, sir.

Q. And the gasoline which it sells at retail is brought into Youngstown in tank cars, is it not? A. Yes, sir.

Q. And emptied out into that storage tank? A.
132 Yes, sir.

Q. And from that storage tank the gasoline is later taken and placed in the containers from which it is ultimately sold at retail? A. Yes, sir.

Q. Most of your company's business is retail sales, is it not, Mr. Marsh? A. Yes, a good deal of it is.

Q. And you operate some filling stations or service stations? A. Yes, sir.

RE-DIRECT EXAMINATION by Mr. Zechiel:

Q. You do a wholesale business, however? A. Yes, sir.

Q. Do you know whether the Texas Oil Company is engaged in leasing or loaning oil tanks and pumps? A. Yes, they are.

Q. Are you yourself intimately acquainted with the method in which they place these pumps to their various customers? A. I am not now.

Q. Were you during the last year? A. I was up until August 1st, 1918. 134

Q. At that time, if you know, how did the Texas Company have their oil tanks and pumps shipped into the state, in carload lots or individual lots? A. Individual lots.

Q. Were they shipped in for some particular customer? A. Not generally; we had them stocked there.

Q. But sometimes for a particular customer? A. Yes, sir.

Q. Where you placed them in stock you left them in the container or wrapper in which they were shipped, or not? A. Sometimes we did.

Q. And then you frequently—did or did you not frequently install these pumps by taking those that 135 were shipped in in individual lots with the crating on out and put them into the place of business where a customer wanted them? A. No, all of the tanks were installed by us and we uncrated them at our plant and inspected them to see that they were in proper condition.

Q. You uncrated them for the purpose of inspection? A. Yes, sir; and then took them and installed them ourselves.

Q. You did that with the pumps, too? A. Yes, sir.

136 *H. J. Seimer, Direct*

H. J. SEIMER was thereupon called as a witness, and being first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. What is your name and address? A. H. J. Seimer, 701 Reading Road, Cincinnati.

Q. Where do you live? A. At Cincinnati, 3522 Evanston Avenue.

Q. With whom are you connected, Mr. Seimer? A. I have my own business, calling it the Merchants' Oil Company. It is not incorporated.

137 Q. You own the business yourself? A. Yes, sir; it is not incorporated.

Q. How long have you been engaged in the oil business? A. Thirty-five years; it will be thirty-five years soon.

Q. During that time you have been buying and selling gasoline? A. I have been for nine years.

Q. Prior to that time— A. (Interrupting.) I was for myself three years when I started and then I worked for the Standard Oil Company, the Whitestone Lubricating Company and the Cincinnati Oil Works.

Q. That is the Standard of Ohio? A. It was then
138 the Consolidated Tank Line Company.

Q. What is the amount of investment you have in the oil industry? A. I have an investment of about $35,000; that is, $20,000 working capital and $15,000 the other.

Q. $20,000 working capital? A. Yes, sir; it is about $35,000; $15,000 in tanks, etc.

Q. What is the territorial extent over which you do business? A. I only do business over about half of Cincinnati, what you would call, if you are acquainted there, Avondale and Walnut Hills, Hyde Park, and that territory.

Q. Who are your competitors there, Mr. Seimer? A. The Moore Oil Company, the Evans Oil Works, the Cincinnati Oil Works, the Refiners' Oil Company, the Kentucky Independent, the Paragon Refining Company, the Standard Oil Company—I think that is all.

Q. Are you acquainted with the business of the Kentucky Independent Oil Company? A. I am some by knowing him—knowing Mr. Brannon.

Q. Do they do business in any other state than the State of Ohio? A. Kentucky.

Q. Are you also engaged in handling pumps and 140
tanks in connection with your oil business? A. No, sir. If a man wants a pump, I call up a pump company and let him go and sell the pump. I don't want to get into it.

Q. You don't buy or sell any gasoline pumps? A. It may be that a customer wants one, that one of my customers wants a tank and I will have the pump man to sell it and then he will pay me; the owner will then pay me.

Q. You are acting then as the agent of the pump company? A. Well, I am taking it because some of those customers have been old customers of mine and they want me to attend to anything that they have got 141
to attend to such as buying pumps.

Q. So that you really act as agent between the pump company and the company? A. Yes, sir.

Q. Have you ever lost any customers in your territory because you refused to install an oil tank and pump or lease it to such customer? A. I think I have but I cannot prove it. I have never seen any agreement. The customers have told me that, but that would be all I would know of it.

Q. Do you mean— A. (Interrupting.) People would say, "Well, I can't buy of you; I want to

142 *H. J. Seimer, Direct*

buy of you." Then they would say, "I can't because the other company has gone and leased me a tank." In other words, they would say to me in this way, "The other company has fixed me up with a tank." While I would say that they did that, I only have it from hearsay.

Q. But they did say to you at the time you solicited their business that they could not buy of you because the other company had fixed them, or something like that? A. Yes, sir; but I never seen the proof.

Q. How many such instances do you recall? A.
143 Well, it has happened to me lots of times, a good many times.

Q. You say you have lost numerous customers? A. It has hurt me and it hasn't. They would buy of those people a couple of years and I would wait my time out and get them back anyway and they would have their pump paid for; that is a fact. You all know it. You are in the oil business.

Q. But at the time you did go to those customers you could not get them? A. Yes, sir; and they were better trade afterwards because just as soon as they got that pump they generally, if they were getting poor gasoline—

144 Q. They probably were. A. I don't say they were. I don't say that. They thought they were.

Q. Did you ever try to sell to any of these retailers of gasoline who refused to buy, giving as their reason that they were under contract arrangement? A. Yes, sir. I had a customer last week, the Hart Tire Company. That is one I recall of Cincinnati. They wanted to buy of me, the man running the place wanted to buy of me—not that I am sore about it, but just telling you how it happened—the man running the place wanted to buy of me. I had it all arranged: I filled him up, and the boss came back,

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the moneyed man of the place, and he said, "Hold on; the refiners has got a lease on that tank," so I lost that. That was last week.

Q. Has that sort of thing happened in a number of cases? A. That has happened to me for nine years; it never stops.

Q. You say you do not lease or loan tanks and pumps; what is your reason for not engaging in that kind of business? A. It don't pay me.

Q. You mean that you do not have sufficient capital to invest in that kind of business? A. Well, for the little territory that I cover it doesn't pay. In my 146
opinion I don't think it pays any of them.

Q. Do you think it is a good business practice, or not? A. I don't think it is. They spoil the trade.

CROSS-EXAMINATION by Mr. Myers:

Q. You say that this matter of loaning pumps by other companies has been beneficial to you? A. No, no; I didn't say that.

Q. You said it a while ago? A. It paid me to wait it out.

Q. It paid you to wait it out? A. I didn't say it was beneficial. 147

Q. After the pumps were loaned, do you mean to say that you finally got the business? A. In many cases—those that want to buy of me.

Q. Were any of those pumps sold by any of these competing companies outright or just loaned? A. I never came in contact much with the Kentucky company. I come in contact more with the others.

Q. You misunderstood my question. A. As I stated, I only had hearsay. I couldn't prove anything. That is what I meant in my first statement.

148 *H. J. Scimer, Cross*

Q. Now, the fact that these pumps were leased—did the customers finally get control of the pumps where they could buy of you, or were the pumps taken out and some other pumps put in? A. Well, the pump would come out. Then maybe they—I could name you cases such as East Walnut Hills—are you acquainted in Cincinnati—the East Walnut Hills garage. I got them.

Q. After the pump gave out? A. I don't know whether it was that or not. The agent brought it in.

149 Q. Were they using the same pump that they had used when they refused to buy of you? A. They were using the same pump.

Q. Then as a matter of fact they must have bought the pump? A. I suppose.

Q. Now, what difference would it have made in your business if these people on Walnut Hills had been agents of the other company and had been given a commission for selling gasoline rather than having loaned or leased him a pump and then having been compelled to use that gasoline? A. Wouldn't that bind that customer to buy of me if I loaned him a pump?

Q. Wouldn't it bind what? A. Wouldn't it bind

150 him if he was my agent, to keep buying of me?

Q. Yes. A. I wouldn't sell that way.

Q. It would be the same practical effect; it would be the same result. A. He would be forced to buy of me.

Q. Yes. A. I say I have no trade like that.

Q. The result would be the same whether he was your agent or whether you had loaned or leased him a pump? A. Oh, yes, that would be the same; that would be the same if I loaned him the pump or he was my agent. That would be the same thing. If he was willing to be my agent or I loaned him the pump, that would be the same thing.

Q. The fact of the matter is you would have more control of him if he was your agent than if you had simply leased or loaned him a pump? A. Yes, sir.

RE-DIRECT EXAMINATION by Mr. Rubrecht:

Q. You would also have more liability if you had employed a particular distributor as your agent, wouldn't you? A. Well, I don't know.

Q. That would be a fact if you employed John Jones to distribute gasoline as your agent, to distribute your gasoline, you would have more liability than if he were distributing for himself and you had no connection with his business other than selling it? A. Yes.

Q. As a matter of fact do these competitors of yours establish agency agreements or tank loan agreements? A. I don't know, because when a man tells me that they have fixed him up, I never ask him any questions and I don't go into any further detail.

Q. What is your best impression from those conversations you had with these particular customers? A. A man may tell me that, "I bought a pump for $15." Now, sometimes that is true and sometimes not true that the other company sells them a pump for $15, and I wouldn't bother about it because maybe the man isn't telling me the truth.

Q. You don't know then whether in your territory your competitors establish agency agreements or loan and lease? A. No, I don't. I don't know any more than what the customers tell me they do.

CROSS-EXAMINATION by Mr. Taber:

Q. You have been up there for nine years, running your own business? A. Yes, sir.

Q. Getting along pretty well? A. Fairly.

Q. As far as you are concerned, it don't make any difference to you whether a fellow has loaned a tank or a leased tank; you go on with your business? A. If a man wants to give those fellows a brick house, it is up to him.

Mr. Westfall: How do you mean, brick by brick, or the whole thing?

The Witness: Oh, the whole thing.

Q. So far as the leased tank goes, it has not inter-
155 fered with your business? A. No, because I started —to make it plain to you, I started with three wagons and I have three trucks added to it, and I have always had enough business for all of them. I am not trying to do all the business in Cincinnati.

By Mr. Zechiel:

Q. You don't mean to say, however, that the lease and loan agreements and the use of that system by your competitors has not injured your business? A. Oh, in that way it has hurt the gallonage. I would have sold more gallons hadn't they loaned the cans, I suppose.

156 By Mr. Taber:

Q. You don't know that to be a fact, do you? A. I say I suppose.

Q. You say you are supposing? A. That is as near as I can come to it.

Q. In other words you have sold about all the product that you could get hold of and handle with your tankage? A. It is about this way, that my being in the business a long while and being a small company, I didn't want to try to get all the business in Cincinnati. I am willing to share it.

Q. What I mean to say is you have handled, you have been able to dispose of all the gasoline that you could conveniently handle through your equipment? A. As far as my force goes that I have now.

Q. But you might have very well gone on and increased that force and there would have been money in it? A. Yes, sir.

By Judge Chamberlin:

Q. Wouldn't that have taken additional capital? A. Yes, sir.

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CROSS-EXAMINATION by Mr. Rubrecht:

Q. Considerable more of capital would be required to establish agents throughout your section, would it not, than the way you are going now? A. What do you mean by agent, please?

Q. Say you bind Bill Smith down in Walnut Hills as your agent and allow him, say a cent a gallon, or a half a cent a gallon to handle your gasoline, the kind that you furnish him exclusively. Now, you would have to have additional liability insurance, would you not; you would have to have a bond from that agent to account for money and to check him up, and you 159 would have auditing to do and so on; that would cost considerably more money, wouldn't it? A. Yes.

Q. Therefore, you would go to a greater expense in establishing agencies than you do now of delivering as you please? A. There would be more money if I had an agent for a half cent.

Q. And there would be more expense, wouldn't there? A. Oh, yes.

Q. You would have longer control over your agents than any of these companies have, by reason of the leasing and loaning of pumps, would you not? A. How is that question?

Q. You could control the agent a good deal longer and a good deal more definitely than they do by the leasing and loaning of pumps? A. Yes.

Q. The agent would be absolutely your servant and you could control him absolutely? A. Yes, sir.

CROSS-EXAMINATION by Mr. Taber:

Q. Mr. Seimer, the more you expand the business the greater stocks you have to have and the greater amount of tankage you must have to handle it, must
161 you not? A. Yes, sir.

Q. And that all requires additional invested capital, don't it? A. Yes, sir.

Q. So that if you are selling a thousand gallons a day more this year than you did last year, you have got to have a relative amount of increased capital to carry on that business; isn't that true? A. Yes, sir; you would have to take some one in with you with some capital.

Q .And the business you have been doing is in comparison with the amount of capital that you have had invested? A. Yes, sir.

162 *RE-DIRECT EXAMINATION by Mr. Zechiel:*

Q. When you said that the length of control of the agent under such circumstances would be greater than the length of control under these lease agreements, of course, you were meaning if an agent were willing to tie up long enough? A. No, I meant as I answered his question, that if I have an agent, which I have five agents under my control, it is better than the man—I answered his question in that respect —is better than the man that they had leased a tank to.

Q. By that you mean an employee? A. Yes, sir; that is what I mean by an agent.

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RE-CROSS EXAMINATION by Mr. Taber:

Q. Mr. Seimer, with the greater number of tank or hand pumps that are distributed over the city, don't that furnish you a more convenient means of distributing the gasoline to the consumers than if there was less of them scattered around? A. That stands to reason, yes. The more tanks you have the better.

Q. So that by reason of the increased number of the curb tanks and pumps that are put in, which are under lease or which are owned by the owners or which are operated as agencies, the public is better served than they would be if there was less of them? A. Yes, though I do not even own a pump at the place. I don't have them at all.

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RE-DIRECT EXAMINATION by Mr. Zechiel:

Q. Would you go as far as to say that if there were a curb pump every ten feet each one would be a little more convenient to the public? A. Well, how I answered his question was that a man going with an automobile, it is often, as I notice at my place, that they run out of gasoline about a half a mile from me. As I figured it, in answer to his question, if there was another station in between that it would be more convenient for the public.

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Q. But there is a limit to that sort of increase in practice? A. There should be.

By Mr. Taber:

Q. Do you think that limit has been reached at the present time? A. Almost.

RE-CROSS EXAMINATION by Mr. Rubrecht:

Q. Mr. Seimer, are you in favor of driving all of the business of the furnishing of gasoline—are you in favor now or not of driving all of the gasoline business into these ornamental and expensively built filling stations, or do you prefer the present system to the exclusive filling station idea? A. If you will let me answer that—I do not want to take too long—

Q. Go ahead. A. I have a filling station at Cincinnati, an old frame shack. I have no pump in
167 front and I think it is as good a filling station as there is in Cincinnati, almost. Now, if those others want to put up their fancy places, that is up to them.

Q. You know that that involves quite a large additional expense? A. That is their fault.

Q. Which do you think is preferable? By an order, the effect of which would be to drive all of the gasoline supply business into a filling station system, or the present system of having pumps here and there to furnish the public demand, which would you prefer now to be continued in practice? A. Well, that doesn't make any difference. It gives the man a chance to sell some gasoline; it helps a man with a
168 pump. The man that has the pump in front of his place—he may need it to sell tires; he may need it to sell accessories to automobiles.

Q. It is a magnet which serves to draw the business to him? A. It is necessary to him. He would not sell gasoline for one cent if it wasn't necessary to have the public come to his place. Now, as a matter of fact if it was all put into stations and not sold to the curb pump, it would hurt that fellow that is selling accessories to automobiles in that the automobiles would not stop there.

Q. And be less convenient for the driver of the automobile, would it not? A. Yes, sir.

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Q. That would hurt you, wouldn't it; that move would hurt you—driving it into filling stations, wouldn't it? A. No.

Q. Unless you built filling stations? A. Yes.

Q. It would hurt your business then? A. It wouldn't hurt the garage. I sell the garages.

By Mr. Westfall:

Q. Which plan do you say would best serve and would be to the greater convenience of the general public? A. Well, for the public, it would be as the gentleman asked me. The more filling stations and 170
the more places to get gasoline is the best service for the public.

By Mr. Zechiel:

Q. Well, of course, with the limitation that you don't think you ought to have one every ten feet? A. Oh, yes.

Mr. Taber: The limit hasn't been reached.

Judge Chamberlin: Well, the public don't care, anyhow.

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JAMES S. TOBITT was thereupon called as a witness, and being first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. What is your name and address? A. James S. Tobitt, Cincinnati, 48 Paddock Road, home address.

Q. What is your business, Mr. Tobitt? A. The oil business.

172 *James S. Tobitt, Direct*

Q. How long have you been connected with the oil business? A. Forty-four years, very nearly as long as Mr. Rockefeller.

Q. During that time what has been your experience in that business? A. What has been my general experience?

Q. Yes, in a general way?

Mr. Taber: What is your company?

The Witness: The Bond Oil Company.

Q. What has been your general experience during
173 your oil career? A. I have been a salesman principally, and president of this company, and I devoted quite a few years lately to the oiling of roads and of streets in the towns; not so much in the refined oil business or gasoline business, with the exception of the last six months, I opened up a little place down at Bond Hill.

Q. Prior to your connection with the Bond Hill Company, of which you are president— A. Yes, sir.

Q. Prior to your connection with the Bond Hill Oil Company, you had not been engaged mainly in the sale and distribution of gasoline to various gar-
174 ages? A. Not very much. I was with the Standard Oil Company twenty-seven years.

Q. Was your connection with the Standard Oil Company just immediately prior to your connection with the Bond Oil Company? A. Yes, sir.

Q. What was your experience with the Standard Oil? A. Oh, I was a salesman, and looked after some of the stations for them.

Q. That was— A. I did special work of different kinds.

Q. You mean salesman of gasoline, or generally? A. Lubricating oils as well as gasoline, yes, sir.

Q. How large is your company? A. Small concern; $25,000 capital.

Q. How long has this company been in existence? A. We have only been selling gasoline about seven months. I have been in the road oiling business myself personally for eight years.

Q. This Bond Hill Oil Company sells gasoline exclusively, does it? A. No, sir.

Q. Or does it deal in other products? A. We deal in other products.

Q. In connection with your gasoline business, do you buy and sell oil tanks and pumps? A. Through 176
a pump company in Cincinnati. I think I bought two direct.

Q. That you own now? A. No, we bought them and sold them to customers and those customers are paying us for them.

Q. Your customers are in the City of Cincinnati, are they? A. Yes, sir.

Q. Do you do business outside of the City of Cincinnati? A. No, sir, only the road oil business.

Q. Do you lease or loan oil tanks and pumps? A. No, sir.

Q. In your short experience, have you ever lost any customers because of your refusal to lease or loan 177
them oil tanks and pumps? A. No, sir, we are too new at the game.

Q. Have you ever tried to sell to any retailers of gasoline your product, who refused to buy from you because they claimed to be under obligations to buy from other competitors? A. Yes, sir.

Q. How many instances of that sort that you have met in your short career? A. Well, quite a few, but I couldn't tell you how many.

Q. Do you know what sort of arrangements they were under with your competitors? A. We saw con-

178 *James S. Tobitt, Cross*

tracts from one or two competitors which customers had and who told us that they were under obligations to buy their gasoline from other people, some from the Ohio Cities Gas people, and then the Moore Refining Company and some from the Standard Oil and some—I don't know—the Cincinnati Oil Works more especially. I have seen one or two contracts that they have had with them. We couldn't very well get their business when they had their pumps in there.

Q. Do you know whether or not the contracts were
179 with respect to the use of certain gasoline? A. I don't remember.

Q. But it is a fact, is it not a fact, that they refused to buy because they were under obligations with respect to the pumps and through which this was distributed? A. Yes, sir.

CROSS-EXAMINATION by Mr. Rubrecht:

Q. Do you know whether or not those contracts constituted the dealer as agent of the wholesalers or not in that case? A. I couldn't tell you, sir.

Q. Couldn't tell? A. I have had men soliciting the
180 business more than myself.

Q. You don't know that the reason they refused to deal with you was because they had leased or had loaned a tank or a pump, do you? You don't know that to be a fact, do you? A. Yes, I do know that to be a fact.

Q. Do you know whether or not they had been appointed agent— A. No, sir.

Q. Of the first party or not? A. I couldn't tell you. I know that the contract—I can't testify or tell you exactly how it read but it was that they were

to sell their own gasoline as long as they had their pump. It might run for a year—

Q. They might also have been appointed an agent?

Mr. Zechiel: Let the witness answer.

Mr. Rubrecht: I beg your pardon; I thought he had answered.

The Witness: They had a contract for a year or two years, generally a year.

Q. Yes. A. "We can't do anything until this year is up; we have a contract to buy our gasoline from those people until that time is up. Then you might 182
come around and we will talk to you." Others had their contracts about up.

Q. You couldn't say from your observation that they were not appointed agents of the first party? A. No, sir.

Q. They might have been so? A. Yes, sir.

Q. And the same answer would apply to them? A. Yes, sir.

Q. You don't say whether they were simply under a contract to use those pumps and buy that particular grade of gasoline— A. (Interrupting) No.

Q. All right; did you name the companies that you found out were engaged in that? A. The Moore 183
Oil Company was one, and the Evans Oil Company was another, and the Standard Oil Company was another. I just merely saw their contracts that they had with the parties we were selling the goods.

184 *Charles Frech, Direct*

CHARLES FRECH was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. What is your name and address? A. Charles Frech, Eaton, Ohio, 901 Baron Street, North Baron.

Q. Mr. Frech, where are you employed, if you are employed? A. White Star Oil Company.

Q. What is your relation to the White Star Oil Company? A. Manager.

185 Q. Is this the White Star Oil Company who is respondent in this proceeding, is one of the respondents? A. Yes, sir.

Q. What is the general business in which you are engaged, your company? A. Distributing gasoline.

Q. In connection with the distribution of your gasoline, do you also deal in pumps and tanks? A. We do.

Q. What is the general territorial area over which you distribute your gasoline? A. Over a territory about seventy miles long, possibly ten miles wide in western Ohio.

Q. Who are your competitors? A. The Standard
186 Oil Company, Indian Refining Company, the Refiners' Oil Company, Gerkins Oil Company.

Q. Those are all that compete in your field, are they? A. Yes.

Q. How long have you been connected with your company? A. Seven years.

Q. Did you have any experience in the oil industry prior to that time? A. I did not.

Q. In your experience in the sale and distribution of gasoline what is the fact; do distributors of gasoline commonly have more than one oil tank and pump installed at one particular point of distribution, say

a garage or grocery store? A. Not in the territory that we cover.

Q. Do you know of any cases in the territory which you cover where there is more than one pump installed? A. Yes.

Q. How many? A. Two, I believe.

Q. Only two cases? A. Two or three.

Q. In those two or three cases do the lessees of the pump, the owners of the places of business, deal in the gasoline or products of more than one company? A. No.

Q. Do you know whether or not the dealers who 188
have these two pumps installed on one premises own both pumps, or either of them? A. In two cases they do.

Q. Own their pumps? A. Yes.

Q. And in the other case? A. We own them.

Q. You own both of them? A. Yes, sir.

Q. Do you believe that the practice of loaning and leasing oil tanks and pumps on tying contracts for a nominal consideration is good business practice? A. Yes, sir.

Q. What is your reason for so believing? A. I think it is a sound business practice for us.

189

Mr. Rubrecht: You think it is what?

The Witness: I think it is a good business practice for us.

Q. Why? A. It gives us a better opportunity to market our goods.

Q. Do you mind explaining that a little more fully? You say it would give you a better opportunity for marketing your goods. Just what do you mean by that? A. Well, there is a good deal of business that we have now that we would not have if we did not furnish the pump.

190 Q. For what reason? A. For one reason, if we did not furnish it, possibly some other oil company would, or if we did not furnish it, the garage man would not install it himself.

Q. Have you ever refused to install a pump? A. Yes.

Q. Or tank, for a nominal consideration under leasing contracts? A. We have.

Q. How many cases of that sort in your experience? A. Well, I would not know exactly.

Q. Oh, some rough estimate? A. Possibly a half
191 a dozen.

Q. What was your reason for refusing to install in those cases? A. We did not think that the party would sell enough gasoline to justify us in installing the pump.

Q. Now, you say that one of the reasons why you think it is good business for you to install these pumps is that if you did not do it, some other company would. Then if no company installed pumps under tying contracts of the sort of contracts which you have with your customers or some of your customers, it would not be necessary for you to install pumps in such cases, would it? A. No, it would
192 not.

Q. Don't you think it would be to your economical interest not to install pumps in such cases? A. No, I do not believe so.

Q. You do not think it would be to your economical interest? A. No.

Q. Then there is some other reason besides that of merely meeting competition? A. Yes.

Q. In all cases? A. Well, what I mean by that is that if we do not install the pumps or if the garage man did not have pumps, the gasoline would be sold from the filling stations.

193

Q. But I am omitting those places where the garage people do not have pumps. I understand from your testimony that there are some cases where the garage man would buy the pump if you did not loan it to him? A. Yes.

Q. There are some cases of that sort, are there? A. Yes, sir.

Q. Now, I am directing your attention to those cases alone where the garage man would buy the pump if you or somebody else did not loan him one. In those cases it would be to your economic interest or not do you think to loan a pump to such an individual if no one else were likely to loan one or put it, if no one else did or would loan him a pump? A. Well, I do not know about that. I think if no other oil company loaned pumps and we did loan it we would get more business if we did loan them.

194

Q. Then in that case that advantage would come from the monopoly you would derive? A. Yes.

Q. So that one of the reasons for leasing and loaning these pumps is that you thereby monopolize the business of your customer? A. Sure, that is one of the reasons.

Q. Now, you say there are numerous garage men and other customers of yours who would not install pumps at all, who would not even have pumps installed on their premises if somebody did not make them a present of one or install one for them or lease or loan it or in some other way furnish a pump practically free of charge to the garage man. What per cent of the pumps that are installed in your territory today do you think would have been installed unless someone had furnished the pump practically free of charge? A. I think about fifty per cent.

195

Q. How long have you been engaged in the practice of leasing and loaning pumps? A. About three years.

Q. How many more pumps are there installed now by comparison than there were three years ago? A. Well, I do not know just how many, but a great many more.

Q. You have been in the business now and you are more or less of an expert; you know something about it? A. I could tell you how many we have installed.

Q. No, I am asking you generally over your territory? A. Well, I would judge sixty per cent more.

Q. Then in the last three years only ten per cent
197 of the pumps that have been installed have been sold or could have been sold to garage people, am I right? A. I believe you are right.

Q. What companies sell pumps in your territory, if any, pump companies? A. You mean who do we buy from?

Q. No, I mean— A. (Interruping.) Or who sells?

Q. Yes, who sells pumps to the individual garage? A. The Bowser.

Q. Anyone else? A. Wayne, Milwaukee, Raymond, and others possibly.

Q. Now, they all sell in your territory? A. Yes, sir.

198 Q. Do they sell to the individual customers? A. To the individual customers and to jobbers, oil jobbers.

Q. You do not know anything about how many pumps they sell, those pump companies, to the individual customers, do you? A. No, I do not.

Q. How long have pumps generally been leased and loaned in the Ohio territory? A. I think about four or five years.

Q. Would you say it was four? A. About four years.

Q. Since 1915; is that about right? (No reply.)

199

Q. Prior to that time did all garage owners and other retailers of gasoline own their own pumps and tanks? A. Yes.

Q. They did? A. They did.

Q. What has been the increase in the sale of gasoline since 1915 over the time prior to 1915? A. That is, you mean—

Q. (Interposing.) No, generally over the state; that is, if you know? A. Well, I will say seventy-five per cent.

Q. Seventy-five per cent increase in the last four years? A. Well, five years. 200

Q. Well, now, I tried to fix that date first. I do not like to slip back and forth on that. Is that 1915 or 1914? A. Well, cut the per cent then to about sixty.

Q. About sixty per cent increase in the last four years? A. Yes, sir.

Q. Now, if I understand you correctly you say that ninety per cent, about eighty per cent of this gasoline, this increase, would not have been sold through curbstone pumps if the oil people had not furnished the pumps practically free of charge; am I correct? A. That is my opinion.

Q. What was the difference in the economical situation which brought about the change in the attitude of vendors, that the first forty per cent of all sales of gasoline was made through curbstone pumps owned by the garage people themselves, and that the last eighty per cent of the last sixty per cent, say fifty per cent of the total, just roughly speaking, had to be sold through leased and loaned pumps? I do not understand that. A. Well, there is a natural increase in the consumption of gasoline. 201

Q. I appreciate that, but why was it that, although the first forty per cent could be sold readily through

privately owned pumps and tanks, the last fifty per cent had to be sold through leased and loaned pumps and tanks? A. I do not know that it had to be, but it seems to be the case.

Q. I understand it is the case. I gather that from all these complaints that have been filed, that it is the case. But I am wanting to know why you say it was necessarily the case and why you say there would not have been a sale through curbstone pumps unless they had been leased or loaned? A. There wouldn't be many pumps in existence today if the
203 oil companies would not have furnished them.

Q. Why wouldn't there have been? A. Because the garage man does not feel justified in buying them.

Q. You will admit that the first forty per cent of the garage people did feel justified in buying them, won't you? A. Yes.

Q. Yet the last fifty per cent of the garage people did not feel justified in buying them in your opinion? A. Yes.

Q. What is the difference? What fundamental economical situation is there in this that makes a difference in the attitude of garage men? A. Well, if the garage man in a small town had a pump and
204 another man started a garage in the same town he would not feel that he would be justified in putting in a pump, because the other fellow already had one. If he had that business all to himself, he might feel justified in putting it in.

Q. Yet you could clearly show him through figures that the consumption had increased more than twice as much as it had been prior to that period, couldn't you? A. We could, yes.

Q. Isn't it a fact that you could have demonstrated to any retailer of gasoline that if it was economical to sell the previous supply of gasoline through pri-

205

vately owned pumps it would be economical to sell the subsequent supply of gasoline also through privately owned pumps; isn't that true? That you could damonstrate it as an economical fact to any retailer? A. You could possibly demonstrate it to him, but whether you could make him believe it or not—

Q. (Interrupting.) I understand that, but you could demonstrate it, couldn't you? A. Yes.

Q. Isn't it your opinion that many of these garage people refused to buy your tanks and pumps because they knew they could get them by lease and loan from somebody else? A. I will admit that.

206

Q. Wouldn't you be willing to admit that a great per cent of these people who lease and loan oil tanks and pumps refuse to buy them because they knew somebody would give them one? A. I suppose that is true.

Mr. Zechiel: I think it is, too. That is all.

CROSS-EXAMINATION by Mr. Holliday:

Q. Mr. Frech, you have stated, I believe, that if this leasing system were abolished and the garagemen and retail dealers had to own their own pumps probably there would be a reduction of fifty per cent of the number of outstanding or existing curb outfits. How would that reduction affect your business? Wouldn't you sell less gasoline? A. We would.

207

Q. Is it not easier under the present system of furnishing an outfit at a nominal cost to the retailer, is it not easier for the small jobber or the man who is starting into the jobbing or wholesale business to build up his gallonage than it was before leased outfits became prevalent or than it would be if the garagemen all had to own their own outfits? A. It would be much easier.

208 *Charles Frech, Cross*

Q. In other words then, you mean that while there may be the same total of gallonage consumed, it is easier for the small jobber or the one beginning in the industry to get a proportion of that gallonage by getting a new customer to install a pump, a customer who had never sold gasoline before; is that your idea? A. It would be much easier for him to get gasoline and at much less expense in that way —to get gasoline gallonage, than by going into the filling station business.

Q. Your idea is that it gives the jobber a filling
209 station at much less cost than if he had to put it on private ground of his own? A. Yes, sir.

Q. From your experience prior to the universal furnishing of outfits by the wholesalers, was it not a fact that the garageman or retailer bought continuously and consistently from one wholesaler for a considerable length of time? A. Yes, sir.

Q. And it was just as hard, was it not, to get patronage from a garageman in those days when he owned his own pump as it is at the present time when he is operating a pump that is owned by somebody else? A. Well, it was hard to get business from them, I know, but I would not say that it was just as
210 hard as it is now.

Q. Is it not a fact in your judgment that there have been more pumps sold in your territory by pump manufacturers on account of the wholesalers furnishing the pumps to the dealers? A. I think so.

Q. Do I understand from your estimates or figures that you have given that there has been as much of an increase as fifty per cent? A. In the past four years?

Q. Yes. A. Yes.

211

CROSS-EXAMINATION by Mr. Myers:

Q. Mr. Frech, what would you say as to the convenience to the public in there being about fifty per cent more pumps than there was four years ago? A. I think it would be a great convenience to the public.

Q. If an order were made to cease and desist against the oil companies from loaning or leasing these pumps, it would be an inconvenience to the public if a great many of these curb outfits were taken out, wouldn't it? A. I think so.

212

CROSS-EXAMINATION by Mr. Rubrecht:

Q. In other words, you are of the opinion, are you not, Mr. Frech, that the small dealer has a chance to get his share of the business under the present system, and he would not have the chance if it were restricted to filling stations or agencies? A. I think he has a better chance under the present system.

Q. It does not require as much capital for him to supply the public as it would under the other system? A. As it would through the filling stations.

Q. How? A. It does not require as much capital under this system as it would through filling stations. 213

Q. Would it not tend to drive the industry more nearly to a monopoly than it is under the present system? A. I think so.

Q. That is, those companies that have the capital to put up filling stations in attractive localities would get more of the business and the small shipper could not afford to do that? A. Yes.

214 *Charles Frech, Re-direct*

RE-DIRECT EXAMINATION by Mr. Zechiel:

Q. Now, Mr. Frech, do I understand you to say that new men can start up in the business easier now than they could when the garage people owned their own pumps? A. No. They could start up easier and with less expense if they were permitted to lease pumps than if they had to go into the filling station game at once.

Q. Now, that is all true; but is it your impression that there must be leased or loaned pumps, or without them we must have filling stations? A. I think so.

215

Q. You think then that if the Government should cancel these leases or ask the various oil people who have such leases to no longer enforce the leases, that that would mean that all the business would go through general service stations? A. No, not all.

Q. Not all of it? A. No.

Q. What per cent do you think would? A. Well, that is pretty hard to determine.

Q. Oh, no, but you are testifying here that that is going to be the result, and if it is pretty hard to determine, I do not believe you ought to testify to that effect; there must be some way to determine it? A. What per cent?

216

Q. Something near it. If your fear is that the business is going to be driven through the service station, it must be founded certainly on some kind of facts in your own mind. That must be based upon, or in some measure upon what per cent of the business is going into that channel. Now, what do you think about that? A. I believe that within the next four or five years that fifty per cent of it would go.

Q. Fifty per cent of the gasoline business will be through service station distribution owned by the various gasoline companies? A. Yes, sir. Possibly not that much in the first year or two, but as soon as these pumps become worn out, I do not believe the garage man will install new pumps.

Q. Fifty per cent, however, of it you think would remain? A. I think so.

Q. That that fifty per cent would remain even if all the garage people owned their own pumps? A. Yes, sir.

Q. It is not your impression, however, that if one 218
were to start in today with a new company without any large amount of capital, it would be more advantageous to him to try to sell gasoline to a public that owned its curbstone pumps than to a public that leased curbstone pumps? A. I do not believe I get that.

(Question read.)

Mr. Rubrecht: You say "public"; you mean "dealers."

Mr. Zechiel: Strike out the word "public" and put in "dealers."

The Witness: For my part, I would rather sell 219
to a dealer that has a pump that belongs to us.

Mr. Zechiel: I do not believe you answer the question. Read the question over again, please.

(Question read.)

Mr. Rubrecht: He has answered that.

Mr. Zechiel: But I do not understand that he is a new company; he is an old company. I am asking if he were a new company starting today.

Mr. Holliday: I cannot understand the question myself.

Mr. Zechiel: Strike the whole question out.

Q. If you were a new company starting in today with a gasoline business with a small capital, which do you think would be the most advantageous to you, to sell to dealers who owned their own pumps or to dealers who leased pumps from competing companies or to create dealers leasing pumps from you? I am trying to get your impression as to which is the way for the new company to start in. A. Well, I would say to the dealer who had a leased pump.

Q. But that is not your full answer to the question, I take it. A. If I was taking on a new customer I
220 would rather furnish him the pump.

Q. If you were a new concern? A. If I were a new concern.

Q. And you were starting in business, you would rather go into the business of leasing and loaning pumps? A. Yes, sir.

Q. Than to sell to people who owned their own pumps? A. I would do both.

Q. No, I am trying to get your preference; you say this business ought not to be stopped. A. I do not know as it would make any particular difference to the new company.

Q. Put it this way; suppose every pump man, every
222 garage man who sold gasoline owned his own oil tank and pump outfit, and you start in a new company, would you prefer starting in in the sale of gasoline in that way, selling to whoever you could in the competitive game, or would you prefer to begin leasing and loaning oil tanks and pumps in competition with all other companies who lease and loan oil tanks and pumps where nobody owned his own pump at all? A. Well, I would rather lease and loan pumps.

Q. Now, why would you rather do that? A. If you have a pump leased to a garage man, you know that when you go there you can fill that tank with your

gasoline. If, on the other hand, he owns his own pump you do not know whether that tank is going to be filled when you get there or not; maybe some other oil company has filled it the day before.

Q. In other words, it is the only way you have of monopolizing your customer, isn't it? Or, at least, it is a good way to monopolize that customer? Isn't that the fact now about it? Yes or no. I do not care which way you answer it. Did you answer the question? A. I will say yes, but on the other hand you are monopolizing to a certain extent when you have filling stations, aren't you? A little fellow cannot afford to put in a filling station, where he could afford to put in a pump for a garage man. 224

Q. You say that the little fellow cannot afford to put in filling stations; are you acquainted with conditions generally out in the western territory outside of the State of Ohio? A. No, sir.

Q. You do no know whether the smaller operators out there have filling stations at all? A. I do not.

Q. Did you ever try here to install filling stations, service stations? A. No, sir.

Q. Did you ever figure it over economically to know whether or not you could or could not? A. Yes.

Q. You have you say? A. Yes. 225

Q. You found that you could not do it? A. Possibly could do it, but it would cost more money.

Q. How is that? A. Possibly could do it, but it would cost more money than the way we operate.

Mr. Rubrecht: I can't hear you.

Mr. Zechiel: I can't hear you either.

A. I say it would cost more money to install filling stations than to lease pumps and tanks to the garage men.

226 *Charles Frech, Cross*

Q. You mean the total operation considered in connection with the amount of gallons would cost more to install service stations? A. It would.

Q. Than to lease and loan pumps generally? A. Yes, sir.

CROSS-EXAMINATION by Mr. Taber:

Q. What is the largest town or city you have? A. Middletown, 20,000.

227 Q. Now, if you install a service station, in addition to the capital that you would have to put in to build that station, you would have to employ men to stay there all the time to operate it, wouldn't you? A. Yes, sir.

Q. Whereas the curb pump and tank, you are to no expense only the furnishing of the tank and pump? A. Yes, sir.

Q. So that from that amount, supposing the filling station would sell a thousand gallons a day and the filling station would sell but 250, upon which would you receive the greater return—

228 Mr. Rubrecht (interrupting): You do not mean the filling station, do you?

Q. The service station sells a thousand gallons and the curb pump where you had it would sell only 250, on which would you receive the greatest return or the most profit from your product? A. Do you mean one pump against one filling station?

Q. That is taking into consideration the amount of your investment and the expense of operating the filling station; in other words, would you receive a greater price, a higher price, for the 250 gallons that you sold, over what you would receive from the one that disposed of the 1,000 gallons? A. I do not believe I get that exactly.

229

Mr. Taber: Strike the whole question out, and I will try to put it so that he will get it.

Q. Supposing a filling station, a service station, would sell 1,000 gallons, taking into consideration the capital invested in building that station, the expense that you would have in operating it, and the tank placed where you are at no expense, only to put the gasoline into it, and if you furnished the pump and tank for that curb pump, which would give you the greatest profit on your gasoline that you furnished, the one at the little curb pump or the one out at the filling station? A. I don't know whether I could just answer that. Take it this way. The same amount of money invested in curb pumps that you would have invested in that one filling station would bring you in the greater return. Does that answer your question?

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Q. That is one answer, yes. A. But one curb pump against a large filling station would be no comparison.

Q. I see. I think that covers it.

CROSS-EXAMINATION by Mr. Risinger:

Q. How many pumps have you got in Middletown? A. Five.

231

Q. What did it cost you to install those five pumps? A. About $1,700.00.

Q. So that at the expense of $1,700.00 you would have five different places in Middletown from which you could sell gasoline and oil? A. Yes, sir.

Q. What would it cost you in Middletown to buy the ground and erect a service station there in a favorable locality to sell gasoline or oil? A. To get a location with an up-to-date filling station, I judge would cost about $15,000.00.

232 *Charles Frech, Cross*

Q. Now, in your business with the capital that you have invested would you be able if you did not have these pumps to buy the ground and establish a filling station in Middletown? A. Not more than one.

Q. It would be doubtful whether you could do that or not? A. Yes, sir.

Q. Would you do that; would you take a chance on a $15,000.00 service station in Middletown? A. No, I don't think so.

Q. So that if you could not put these five curbstone pumps there, you would not be doing any business in
233 Middletown? A. Probably not.

Q. How many pumps have you in Greenville? A. Four.

Q. Do you know about what it cost you to establish those four pumps? A. Possibly thirteen or fourteen hundred dollars.

Q. Could you state approximately what it would cost to buy the ground and erect a filling station in Greenville, a service station? A. It depends a good deal on the location.

Q. Some favorable location there where you could do some business. A. Possibly nine or ten thousand dollars in Greenville.

234 Q. Now, with your capital and the means you have in your company, would you take the chance of spending $10,000.00 there for a service station in Greenville if you were prevented from having these pumps? A. I do not know that we would possibly install a filling station, but we would much rather keep the pumps.

Q. I am asking you if the chances are not if you did not have these pumps there in Greenville, were not allowed to put in these pumps and lease them to your customers, isn't it a fact that you would not be doing business in Greenville at all? A. We would not be doing very much.

Q. What is the capital stock of your company? A. The capital stock is $40,000.00.

Q. What is your surplus? A. About $60,000.00.

Q. Is that what you have accumulated and made out of the business since you have been in the business, seven years? A. Yes.

Q. You have done that by shipping these curb pumps in different towns—how many pumps have you installed altogether? A. Twenty-four.

Q. Do you know approximately what it cost to install all these pumps? A. A little less than $5,000.00.

Q. That would not have been enough to have bought 236
the ground and established one service station? A. No, sir.

Q. With that amount of money you can establish 24 pumps where you can sell and distribute gasoline to your customers? A. Yes, sir.

Q. Do you sell any of this gasoline outside of the State of Ohio? A. No, sir.

Q. Any oil or anything? A. No, sir.

Q. All confined to the State of Ohio? A. Yes, sir.

Q. You buy some pumps in Indiana? A. Yes, sir.

Q. You bought one in Milwaukee? A. Yes, sir.

Q. And some other points? A. Adrian, Michigan.

Q. These pumps you bought for your customers, 237
your oil and gasoline customers, and either sold them to a customer or leased them for a nominal consideration of a dollar a year? A. Yes, sir.

Q. Which is rarely ever paid? (No reply.)

Mr. Risinger: I think that is all.

RE-CROSS EXAMINATION by Mr. Holliday:

Q. Forgetting for the moment the question of the filling station, let us take a concrete case. Suppose that you are a new concern in the jobbing business and

you want to get into business in a certain town; let us say that there are at that time five retailers of gasoline and there are two or three wholesalers that are supplying them with gasoline; which would be the easier way for you to get gallonage in that town, to try and solicit and get business from those five retailers that were already in business or to put some new people into business and get new customers by putting in leased curb outfits to people who had not been in the business before? A. It would be easier to get it by leasing the pumps.

239 Q. Is that what you mean in part in saying that it was easier for a new company or for a company with small capital to get a start and increase its gallonage under this leasing system? A. That is what I meant.

RE-DIRECT EXAMINATION by Mr. Zechiel.

Q. And you think that would be an easier way even though the garage people owned all their own pumps and were free to buy from anybody who came in? A. I think it would, yes.

Q. And you think it would be a more economical way? A. I don't know that I could say it would be a

240 more economical way.

Q. I do not believe you are talking quite loud enough. A. I say I do not believe it would be a more economical way.

Q. What do you think is the limit of that sort of business procedure? How long in this particular town to which Mr. Holliday referred, where there are five companies doing business in one town, and each time a company is organized and starts a new system of pumps is begun in that town, how long can that sort of business procedure in this particular town continue do you suppose? For the next twenty-five years each

company can go ahead and enter into new leases with new people, starting new people in business? A. That would depend on how many new companies came into that town.

Q. There would be a limit, though, wouldn't there? A. Yes, sir.

Q. Isn't it a fact that that sort of practice is likely to overly increase the number of curbstone pumps in a particular town from an economic point of view now? A. An oil company, when they are looking for a location, they usually consider the number of oil companies that are operating in that town. 242

Q. So that if there are too many there they do not go at all? A. No, sir.

Q. They would go if they were free to sell to anybody? A. I did not say that.

Q. They would be more likely to go? A. Well, I don't know about that either.

Q. Do you mean to say that if here is a town of 20,000 people, and every curbstone pump is owned by the owner of the place of business, and here is another town of 20,000 people and every curbstone pump is leased by some competing oil company or by numerous competing oil companies, and they are both up to a maximum number of pumps that would be good business for that town, that a new company organized or a company not doing business in that town would not be more likely to go to the 20,000 town where the curbstone pumps are all owned by the owners of the garages than they would go to the town where they are leased by the garage men? A. That depends on the population of that town. 243

Q. 20,000 I gave it, all up to the maximum point of efficiency. A. With how many oil companies in the town?

Q. 3,000,000, if you want to; I don't care how

many. A. If there were 3,000,000, there wouldn't be anybody else go in in either case.

Q. Suppose there were ten in both cases? A. Ten oil companies.

Q. Yes, but as many pumps as are necessary in both towns, but in one they are all leased and loaned under tying contracts and in the other they are all owned by the garage people free to buy from anybody, and you are a new dealer in either one of those towns, you are a new man on that job, which one will you select? A. I do not believe it would make any difference to me.

245 Q. You would just as leave— A. (Interrupting.) I would stand just as good a show in one town as I would in the other.

Q. Now, this filling station proposition; you say it is your experience that the filling stations are less economical than the pump system, the leasing and loaning of pumps system of doing business. A. I would not say all.

Q. Now, what class of those; what per cent of them in your experience; under what conditions is that true? A. In the smaller towns.

Q. What do you mean by "smaller towns"? A. A town of 7 to 14 or 15,000.

246 Q. In a town from 7 to 15,000 then they would become uneconomical; is that right? A. I do not say that it would be uneconomical; but I do say that you can invest that same amount of money in curb pumps and get a better return.

Q. I guess there is no harm in calling that uneconomical then, is there? It is not good business, is it, to invest money in something that costs more, with less return, or with the same return? Therefore, you will say that in towns, of five or six thousand people generally the curbstone pump is the most economical way of distributing gasoline? A. Yes, sir.

Q. As compared with the filling station? A. Yes, sir.

Q. Or the service station? A. The service station, yes, sir.

Q. Do you think that if there were an order issued which would result in the ownership by retailers of curbstone pumps, gasoline pumps generally, that in the small town it would result in a monopoly to large companies which would install service stations, in these towns of 5 or 6,000 people? A. I think it would.

Q. You think in the town of 5 or 6,000, although uneconomical, nevertheless that oil companies with 248
capital would establish service stations? A. If the curb pumps were disposed of—

Q. (Interposing.) I do not think anybody said anything about disposing of the curb pumps. I said if we got rid of leasing and loaning. Nobody said anything about disturbing or doing away with curb pumps at all, That is not in the question. The question is if the curbstone pumps are thrown open free to competition without tying contracts, in other words, thrown open to free competition in a town of 6 or 7,000, do you think that when the result would be that there would be a monopoly in favor of those companies who would and could afford to put in service stations? A. 249
I think so.

Q. You think in spite of the fact that the service would be uneconomical in those towns, there would still be a monoply in their favor? A. A service station might be uneconomical for the first year or two, but after these pumps were worn out, I do not believe the garage man would reinstall those.

Q. Oh, fifty per cent of them— A. (Interrupting.) They might.

Mr. Lippincott: Oh, he didn't say that.

Mr. Zechiel: Oh, yes, he said 50 per cent of them would remain.

250 *Charles Frech, Re-direct*

Mr. Westfall: That was under an entirely different set of circumstances.

Mr. Zechiel: We will just ask the question again. I think he made the remark before.

Q. I understood you to say a while ago, Mr. Frech, that if the Commission should stop lending and leasing pumps in the State of Ohio, that 50 per cent of the business would be done through curbstone pumps still? A. At present.

Q. I think you said for the present more than that, but ultimately it would be 50. Am I right about that? 251 If you want to change your answer, I am perfectly willing, but I want to get it straight. Do you think that ultimately there would be less than fifty per cent? A. I believe there would.

Q. What would be the per cent of them? A. Possibly 25 or 30 per cent.

Q. 25 or 30 you would say now. No matter what you may have said before. At present, however, you think that 50 per cent would remain? A. Yes, sir.

Q. How long would that 50 per cent remain? A. I couldn't say just how long they would remain. Until these pumps are worn out. I do not believe the garage men will replace the pumps with new ones.

252 Q. Do you think that the condition under which 40 per cent of the garage people own their own pumps is to be supplanted by a condition where only 20, or 25 to 30 per cent of those same people will own their own pumps if service stations come into existence? Straighten that up a bit. I think you said 40 per cent of the business was done in 1915, of the present business was done in 1915 through privately owned pumps. Am I right about that? A. How is that? State it again.

Q. Forty per cent of the present business was done in 1915 through privately owned pumps?

Mr. Holliday: When?

Mr. Zechiel: In 1915.

Mr. Holliday: I understood him to say that this started in 1915.

Q. All right; if it had been one day before; at that time in 1915, 40 per cent of the business was done through privately owned pumps; that is correct? A. Well, at that time all the business that was done at that time was done through privately owned pumps.

Q. You said that was 40 per cent of the business. A. Yes, sir.

Q. Then 40 per cent of the present business in 1915 254 was done through privately owned pumps? A. Yes, sir.

Q. Yet you say that if we were compelled to return to privately owned pumps, only 25 to 30 per cent of that business would remain? A. Yes, sir, of the business which we have now.

Q. Yes, of the business which we have now, which is the same as 40 per cent.

Mr. Holliday: No.

Q. Let's see if that is true. In 1915, 40 per cent of the business was done through privately owned pumps; 40 per cent of the present business was done in 1915 255 through privately owned pumps? A. Yes, sir.

Q. If today we were compelled to go back to privately owned pumps, how much of the business would be done through privately owned pumps?

Mr. Holliday: You mean privately owned pumps of retailers.

Mr. Zechiel: Yes, sir, I am speaking always of these curbstone pumps; I am speaking of all pumps except this question of service stations.

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A. That would be hard to determine.

Q. It is not very hard to determine. Only 25 to 30 per cent you testified to. What is there in the economics of this situation that in 1915 an amount equivalent to 40 per cent of the present sale of gasoline was done through privately owned pumps, and yet today only 25 to 30 per cent of that amount would be done through privately owned pumps, if we were to go back to privately owned pumps? A. Today we have the filling station, but in 1915 we did not.

Q. Was not the filling station an economical possi-
257 bility in 1915 as well as today? A. It was a possibility, yes, but we didn't have it.

Q. Is there any fundamental difference in the economics of the situattion in 1915 and today from that point of view? A. Yes. The consumer will go to the filling station; on account of the filling station being in town, the garage man won't replace his worn out pump.

Q. Let us take up another angle. You say you cannot afford to go into the filling station business, because you cannot make as much profit out of the filling station business as you can out of the retail business; I mean the curbstone business; that is true; that
258 is your testimony? A. Yes.

Q. Therefore you say you have to give the garage people a pump and tank in order to induce those people to deal with you. Correct? A. What I meant by that, Mr. Zechiel, that I could distribute my gasoline over the town to possibly eight or ten points for less money than I could put it at one point with the filling station.

Q. I appreciate that; but my question is whether or not you do not find it to your economical advantage to give away these pumps and tanks in order to distribute that gasoline? A. Yes.

259

Q. In doing so, you give away the investment you have in those pumps and tanks, don't you? A. Yes, sir.

Q. What effect would it have on your business, do you think, if, instead of putting the investment you have in pumps and tanks and giving that away, you would reduce the price of gasoline to meet this filling station competition? A. Reduce the price to that particular customer?

Q. Well, to all your customers. You are giving them all pumps, aren't you? A. Yes, well, these pumps—we figure that as a part of our equipment, you know.

260

Q. I understand, but suppose you do not have those pumps at all, you do away with them, you do not invest capital in pumps at all, but instead you reduce the price of the gasoline to cover that difference, what effect would that have on your business? A. It would be pretty hard to determine now to reduce the price of gasoline.

Q. You know what your capital investment is in pumps? A. There would be no difference to us whether we gave the man a pump or whether we gave him that much of a reduction in the price of gasoline, or give him a rebate as far as that is concerned.

26:

Q. If it is fundamentally an economical thing to do, it ought to attract customers just the same, the reduced price of gasoline or installing a pump and tank under a tying contract; isn't that so? A. Well, if you reduce the price of gasoline to a customer, you could reduce it very little, and it would take him a long time to pay for that pump, and he would have to pay cash for that pump when he bought it.

Q. That is, of course, assuming that the pump companies would not sell him one on time payments, but you do not know that that is true, do you? A. No

262 *Charles Frech, Re-cross*

it is true, I think. I do not think you can buy them on time payments.

Q. You don't know whether you can or not? A. No, sir.

Q. You wouldn't dispute it if some pump company would testify that they do? A. No, I would not.

RE-CROSS EXAMINATION by Mr. Risinger:

Q. Mr. Frech, if you put a pump in for a customer and it proves not to be a success or not a paying in-
263 vestment, you take the pump out? A. Yes, sir.

Q. You can install it some place else? A. Yes, sir.

Q. If some prospective customer buys a pump and installs it and it is not a success, then he has the old pump on his hands? A. Yes, sir.

Q. The chances are he cannot realize very much out of it? A. Yes, sir .

Q. Wouldn't that fact deter a great many men from going into this business? A. Yes, sir.

Q. Buying these pumps individually? A. Yes.

Q. These pumps you furnish you do not consider you are giving the pump to the customer? A. No.

Q. Mr. Zechiel asked you whether you gave these
264 pumps to them or furnished them for nothing. The pumps are still yours? A. They are still our pumps, yes, sir.

Q. You consider the pumps you have there as part of your equipment? A. Yes, sir.

Q. You have a lot of motor trucks hauling this oil and distributing it? A. Yes, sir.

Q. Have tanks to store it? A. Yes, sir.

Q. And consider the pump in the same light you do your motors and equipment; it is just as well to reduce the price of gasoline and ask the customer to come to the tank and haul it away himself, is it not? A. Yes, sir.

Q. That would not be good business, would it? A. That is my answer.

Q. The chances are if you would undertake to do that you would not have very much business? A. No, sir, not very much nowadays.

Q. In order to transact your business you must have oil tanks, haul it to the customers and deliver it on the ground? A. Yes, sir.

Q. You found out by furnishing the pump and having a place to put the pump, you could do the same business and make more money and be more sucessful than to require the dealer to buy the pump? A. Yes, 266
sir.

Q. Your customers have the privilege of buying a pump? A. Yes, sir.

Q. That is at their option; if they want to pay for the pump, they can do it? A. Yes, sir.

Q. Of course, then, if they pay for them, you would have no control over them, would you? A. No, sir.

RE-DIRECT EXAMINATION by Mr. Zechiel:

Q. How many customers do you have who do not get pumps of you at all? A. You mean dealers? Garage customers? 267

Q. Yes, sir. A. Who have their own pumps?

Q. Yes, who own their own pumps. A. I couldn't say now.

Q. Do you know anything about what per cent? A. No, I would not. We have a lot of customers that I never met personally, and I couldn't say just how many we have.

Q. Then you do not know what per cent of your business is done through leased pumps at all? A. Well, we sell a lot of gasoline and kerosene to farmers. It would be easy enough to figure what per cent we

268 *Charles Frech, Re-cross*

put through our own pumps, but I couldn't do it here.

Q. The farmers do not have any of your leased pumps? A. No.

Q. You do a large business with them? A. Yes, sir.

Q. Now, do you know about how much business you do with garage people who own their own pumps? A. Not very much.

Q. But you cannot get down to a final figure closer than that? A. No, sir.

Q. You do not know about how many customers
269 you have of that sort? A. No.

Q. When you remove these pumps do you remove the tanks also? A. Yes, sir.

Q. You take them out of the ground? A. Yes, sir.

Q. Would there be any reason why the owner of the garage could not sell his pump and tank if he cared to and got tired of dealing in the oil and gas business? A. Why he could not sell it?

Q. Yes; there is a market for second-hand pumps, isn't there? A. Oh, yes.

RE-CROSS EXAMINATION by Mr. Holliday:

270 Q. Mr. Frech, I think that there is some confusion caused by the seeming assumption by Mr. Zechiel that if all the garage men and retailers owned their own pumps that they would buy their gasoline from any tank wagon that happened to come along. Now, is that true? Take a concrete instance again? Suppose a town in which there are five garage men that own their own pumps and they are being supplied by two or three wholesalers. Isn't it a fact that those garage men will continue from month to month to deal with the one particular wholesaler with whom they are carrying an account, and that it is a very difficult thing for

a new wholesaler in that town to get that garage man to transfer the account to him? A. Yes.

Q. Much more difficult than to seek a gallonage through creating new customers who have not been in the business before? A. Yes, sir.

Q. As a matter of fact, in your judgment, hasn't this adoption of the system of leasing or loaning of pumps resulted in a keener competition among the wholesalers and an easier competition for the wholesalers with small capital? A. Yes.

RE-DIRECT EXAMINATION by Mr. Zechiel: 272

Q. How do you know that to be true? A. We have had the experience.

Q. You mean with all the rest of the smaller concerns, or just your own? A. We were a small concern ourselves.

Q. And you tried to sell, did you, without leasing and loaning? When did your company begin its operations? A. I got into the business about seven years ago.

Q. Was the company in existence prior to that? A. Yes.

Q. How long had it been in existence prior to that 273
time? A. Well, I don't know just exactly how long. It started in under the name of the Pure Oil Company, and in 1914 we incorporated under the name of the White Star Oil Company. In 1914 we had one station, tank station in Eaton; now we have six. We have gone into these different towns and got a pretty nice business in a short time by using pumps.

Q. You had no business at all prior to the time you went into the leasing of pumps? A. Oh, yes, we had business.

Q. To whom did you sell gasoline at that time? A. To the farmers mostly.

Q. Didn't sell any to garage people at all? A. Not until 1914.

Q. Not until you put in your own pumps and tanks? A. Well, we did not start to putting in pumps right away.

Q. Did you sell gasoline? Were you successful in selling gasoline before you put in pumps and tanks? A. We were not.

Q. You did not sell any to the garages until you put in your own pumps? A. Yes, I sold to some garage people that had a 50-gallon tank at the
275 back end of the garage, and they would draw the gasoline out into a bucket, measure it and take it out and put it in the machine.

Q. At that time when you began leasing and loaning pumps, were there pumps in your territory, curbstone pumps owned by garage people? A. Yes, sir.

Q. Did you say you could not sell to any of those? A. We did not.

Q. Did you try? A. Yes.

Q. You solicited them all? A. I think there was only one pump at that time.

Q. So that, as a matter of fact, a very small per cent of the gasoline gallonage went through pumps at
276 all in your town? A. There was a very small per cent of gasoline sold at that time compared with what is sold now.

Q. I am talking about the relative per cent, whatever was sold, however? A. Yes, sir. The most of the gasoline was at that time sold direct to the consumer, had a tank in a little garage or his stable.

Q. Your experience at that time when you were trying to sell to garage people who owned their own pumps is limited to just that one town and that one experience where there was only one pump in the town; is that right? A. Yes.

277

Q. You don't know whether or not if you had been in a larger community, where there were numerous oil tanks and pumps owned by garage people themselves you could have sold without leasing and loaning oil tanks and pumps, do you? A. During 1914 we installed a station at Germantown, and we got a little business there without installing pumps.

Q. You mean you sold to whom? A. To the garage men.

Q. How many pumps were there in Germantown at that time? A. Two, I believe.

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Q. You sold to one of those? A. Yes, sir, sold to one of them.

Q. Did you try to induce anybody else to put in a pump in Germantown at that time to meet the prospective increase in gasoline consumption? A. Why, we always try to do that, but I don't know whether we did in this particular case in Germantown.

Q. What was your experience in those towns, larger towns than you are speaking of now; were there many pumps? Have you had any experience? A. Well, when we got into the larger towns, we started leasing pumps right away.

Q. At that time you had adopted the practice of leasing pumps? A. Yes.

279

Q. You did not make any efforts to sell to owners of pumps? A. There were very few owners of pumps in those towns.

Q. So as a matter of fact, you do not know whether or not the private ownership of pumps in those larger towns would result in a ready market for newcomers or not, do you? You have never experienced it, have you? A. I do not get that.

(Question read.)

280 *A. C. Harvey, Direct*

A. C. HARVEY was thereupon called as a witness, and being first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. What is your name and your address? A. A. C. Harvey, 246 North High Street, Columbus, Ohio.

Q. What is your position with your company?

Mr. Ford: What company is he with?

Q. What is your company? A. The Ohio Cities Gas Company.

281 Q. What is your position with that company? A. I am one of the attorneys.

Q. As attorney for the company, do you have charge of the distribution or anything to do with the distribution of their product? A. Well, not particularly, except as legal questions arise in distribution.

Q. You do not know anything about their general distribution and their methods of doing that? A. Well, I know only a little about their method of distribution.

Q. Do you know the territorial extent over which they do business? A. Well, the distribution business extends over parts of Ohio and the State of New

282 York, that is, part of the state I mean, part of the State of Pennsylvania, and to some extent in Vermont, in Massachusetts and in New Jersey and West Virginia.

Q. Who is your general manager? A. You mean of the distributing business?

Q. Yes, of the distributing business? A. Mr. S. M. Coen.

Q. Where is Mr. Coen; what is his address? A. He is located at the principal office of the company here.

Q. Is he in the city now? A. I do not think he is, but I couldn't say positively to that.

Q. Who is in your office now who knows about the sale and distribution of your gasoline and the use of oil tanks and pumps in connection therewith? A. Mr. Coen is the head of that division.

Q. Your company is engaged in the sale and distribution and the leasing and loaning of oil tanks and pumps in connection with your business? A. Well, in some few instances we have purchased one or two pumps at times; that is, in lots of one or two or perhaps three or four, and had those pumps, that is, one pump shipped by the pump works to a customer, and we, as I understand the practice then, have always 284
received the pump and uncrated it and employed workmen to install it.

Q. But you had it sent in to you for the one particular customer? A. Not exactly. I did not mean that. I think they usually have it sent to the customer, but we receive it at the customer's place of business and uncrate it and install it, using our own workmen, the workmen that we employ to excavate, and plumbers to put in or connect up the tank.

Q. From where are these pumps and tanks sent? A. Pardon me until I finish.

Q. Oh, I thought you were through. A. And electricians to do any electric wiring or anything of that 285
sort, and after it is installed, why there have been instances where we sold the pump and the tank to the customer, at a price which represented a profit to us of 20 per cent and 10 per cent on the cost of the pump. At least, that is the case in pumps that I think the distributing division purchased from the Wayne and perhaps from the Bowser people also. And the pump belongs to the customer as soon as he pays for it. These payments are usually one cent a gallon on what he uses and the price, if they have a written agreement, the price is fixed in there. At least, in

286 most instances our practice is that he has the option of paying cash or paying for it at the rate of one cent a gallon.

Q. Do you ever lease or loan these equipments? A. Not during the last six months.

Q. Prior to that time you did? A. Yes, I think the company went into the distributing end of the business in a small way in the year 1917, and took over other companies that had pumps installed for a nominal rent. My understanding is that there are some of those pumps still in operation.

287 Q. There are more of those still in operation? A. Yes.

Q. But all your new arrangements, agreements and contracts with customers are all similar to the ones you describe, namely, sale? A. Yes, sir.

Q. Payment to be made on a rebate on the price of gasoline? A. A cent a gallon above the market price. The cent is credited on the cost of the equipment, which cost is stipulated in the written agreement if there is one, and if not, the oral agreement.

Q. Is there a written or an oral agreement or understanding as to what gasoline may be used in this equipment prior to the time that it becomes the property,

288 the exclusive property of the customer? A. There is usually such understanding or agreement, that it is to be used for gasoline purchased from us.

Q. From whom do you have these pumps sent where you install them for the customer? A. In a good many instances they are our own pumps, that is, second-hand pumps or pumps that have been taken out from other places.

Q. Where they are new pumps? A. I believe it is the Wayne Tank & Pump Company.

Q. Of Fort Wayne, Indiana? A. Yes, sir.

Q. And the Bowser Company? A. Yes, I believe they are made there.

Q. And you have them sent directly from the factory to the customer, as you previously described? A. Yes, sir.

Q. Have you ever lost customers because you refused to lease or loan your tanks and pumps to your knowledge? Mr. Coen is the party who has jurisdiction of that subject? A. Possibly he could give you the information on that subject. Those matters are very largely in the control and jurisdiction of the station manager in the various cities in other states. 290

Q. Do you think Mr. Coen could be here tomorrow? A. I would certainly try to have him here, if it is possible to get him here.

Mr. Zechiel: I would appreciate it if you would have him here; he probably knows more about that end.

Examiner McCorkle: We will now adjourn until 10:00 o'clock tomorrow morning.

Whereupon, at 5:00 o'clock P. M., an adjournment was taken until 10:00 A. M., Wednesday, October 29, 1919. 291

THOMAS K. BRUSHART was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. What is your name and address? A. Thomas K. Brushart, Portsmouth, 1501 Gallia Street.

Q. What is your business, Mr. Brushart? A. Distributing oil and gasoline.

292 Q. What is your relation to your business? A. I own the business.

Q. Oh, you are the owner? A. Yes, sir.

Q. Do you do business under your own name? A. No, sir.

Q. What is the name of the company under which you do business? A. The Motor Fuel & Lubricating Company.

Q. The Motor Fuel & Lubricating Company? A. Yes, sir.

Q. A corporation? A. No, sir.

293 Q. You own the entire business yourself? A. Yes, sir.

Q. What is the general territorial extent over which you conduct business, Mr. Brushart? A. Well, we have about five counties in the southern part of Ohio.

Q. Is that all the way across the southern part of Ohio or one portion more than another? A. Well, they are bunched in there together.

Q. Who are your competitors? A. The Standard of Ohio, the Pure Oil Company and possibly the Moore Oil Company.

Mr. Taber: Possibly the Moore Oil?

The Witness: I say possibly they come in; the
294 Moore Oil Company comes through there.

Q. What besides the Moore, Pure and Standard? A. That is all.

Q. And others? A. I presume there are a lot of them send their men through there.

Q. Did you say that the Pure Oil Company is a competitor of yours? A. Yes, sir.

Q. In connection with your business in buying and selling gasoline do you also buy and sell pumps and tanks? A. Yes, sir.

Q. Where do you buy these pump and tank equipments? A. From the Wayne Oil Tank & Pump Com-and S. F. Bowser & Company.

Q. Who are all located in Indiana? A. Fort Wayne, Indiana, yes, sir.

Q. Do you buy from any other company? A. No, sir.

Q. How do you have your pumps shipped? In individual lots or carload lots? A. Individual lots.

Q. Are they shipped directly to you or to your customers? A. They are shipped to us.

Q. Do you ever have any shipped directly to your 296
customers? A. I do not recall that we have.

Q. When you receive these pumps, do you order them and receive them for a particular customer? A. No, sir, we aim to keep a pump of some description on hand most of the time.

Q. You never have ordered a pump for a customer? A. Yes, sir, I think we have.

Q. And have placed it with the customer? A. Yes, sir.

Q. And those times you have ordered and received direct from the Bowser or Wayne Company, Fort Wayne, Indiana, do you also recall whether the pumps 297
were so received and placed with customers that leased or had loaned to them such pumps? A. Yes, sir.

Q. Do you lease and loan pumps to your customers generally? A. Not generally.

Q. You do some? A. Yes, sir.

Q. To some extent? A. Yes, sir.

Q. Do you also sell to your various customers? A. Yes, sir.

Q. Those pumps that you sell to your customers, have you had those shipped directly to the customers? A. No, sir.

298 *Thomas K. Brushart, Direct*

Q. All those are shipped to your own warehouse, also? A. Yes, sir.

Q. Do you do your own installation? A. No, sir, we have that done by a plumber or someone else.

Q. Do you deliver your pumps and tanks to the premises of the purchaser or to the user of them? A. No, sir.

Q. They come to your warehouse, and get them? A. The plumber usually does, the man that sets them up.

Q. Do you uncrate your pumps and tanks before
299 you lease or loan them or sell them? A. The plumber—

Q. Not until the plumber comes to get them are they uncrated? A. Yes, sir.

Q. He comes to get a particular pump to install in a particular place? A. Yes, sir.

Q. How many leases and loans do you have in a general way? A. Oh, I suppose twelve or fifteen.

Q. In how many instances in a general way have you sold pumps outright to your customers? A. Well, just two.

Q. Do you have customers to whom you have neither sold or leased or loaned pumps? A. Yes,
300 sir.

Q. In connection with your business you are acquainted generally with the whole territory over which you sell your goods and products? A. Yes.

Q. You have been over it personally, haven't you? A. Yes, sir.

Q. What has been your experience? Do retailers of gasoline commonly have more than one oil tank and pump installed on their premises? A. No, sir.

Q. The general custom you think is to have just one, isn't it? A. Yes, sir.

Q. And where you have leased or loaned your equipment your customers buy only gasoline from you? A. Well, not always.

Q. Is that the general practice? A. I would say as a general rule they buy our products.

Q. Where you do not deliver oil and gasoline to customers who have a leased oil tank and pump, do you sell to them continuously or do they buy from competitors of yours as well as from you? A. Well, our trade stays pretty well with us. Lots of people divide their business up. Lots of them do not. 302

Q. That is, those who own their own tanks and pumps are likely to divide their business with several oil companies? A. Yes, sir.

Q. Do you consider the loaning and leasing of oil pumps and tanks on tying contracts for a nominal consideration sound business practice? A. Yes, sir, I do.

Q. What is there about the practice that makes you say it is a good sound business practice? A. Well, to stay in the oil business you have to have the gallonage, and to get that you have got to make it worth the customers' while to handle it, and the man does not want to handle gasoline for one cent and invest from $200 to $400 in equipment to handle it with. 303

Q. So that it would not be profitable for anybody to retail gasoline unless he were underwritten by the owner or the seller of the gasoline. A. Not as a business proposition of selling gasoline alone, no.

Q. So you do it because in that way you are enabled to get a corner on your customers and hold your gallonage up? A. We feel it is fair to him to do that.

Q. No, you do not answer my question. A. I do not know that I got your question.

304 *Thomas K. Brushart, Direct*

(Question read.)

A. We do it to hold our gallonage up.

Q. And if you could not retain your customer by entering into these tying arrangements with him so that he is compelled to buy from you, you feel that you would lose your gallonage. A. We would have to take other means to get the gallonage.

Q. If you will just answer my questions— A. Well, yes.

Q. Do you install these leased pumps for every cus-
305 tomer who asks you to install them? A. No, sir.

Q. Did you ever lose a customer because you refused to install a pump for a nominal consideration? A. Possibly, yes, sir.

Q. You are not sure about that? A. No, sir.

Q. Did you ever try to sell gasoline to a customer who had leased a pump from some competitor of yours? A. We have sold gasoline in that manner, yes, sir.

Q. Did you ever try to sell to such a retailer and be unable to do so because of his arrangements with a competitor of yours? A. Well, we do not solicit business that are users of other people's pumps. I
306 would say that we did not solicit that business.

Q. Never have solicited that business? A. No, sir.

Q. Why don't you solicit it? A. Well, it is not fair to the competitor.

Q. Oh, you are just doing it out of generosity to your competitors? A. That is what we regard as a business principle, yes, sir.

Q. Why is that necessary, that you regard that as a business principle? What is there back of that sort of thing? A. The other company has an investment there on which they should get a return.

Q. That is, by return you mean the other company should get the gallonage? A. Yes, sir.

Q. If, then , the other company did not have the investment, you would not be obligated, would you? A. No, sir.

Q. So that you cannot sell to your competitors' customers who have these lease agreements because of the fact that they have a lease agreement; isn't that so? A. We have sold them.

Q. You have never solicited them? A. No, sir.

Q. But you have sold them? A. Yes, sir.

Q. That was not fair to your competitor? A. If 308
a man needed gasoline and we had it, and he asked us for it, we let him have it.

Q. Is that a common occurrence? A. Not necessarily, no, sir.

Q. So that you might practically say you do not solicit or sell gasoline to a customer who has a lease agreement with a competitor; that is true? A. Yes, sir.

Q. Now, if your competitors had no lease agreements with these customers, wouldn't you be at liberty to sell them? A. Yes, sir.

Q. And wouldn't that increase your gallonage? A. 309
Yes, sir.

Q. And if nobody leased or loaned oil tanks and pumps and entered into tying contracts with retailers of gasoline, wouldn't that enable you to conduct your business with less capital investment? A. No, sir.

Q. It would not? A. No, sir—and get the gallonage.

Q. Don't you invest money in your tanks and pumps? A. Yes, sir.

Q. How much does each one cost you? A. From $200 to $400.

Q. You have about thirteen of those installed? A. Yes, sir.

Q. You have something like between three and four thousand dollars invested? A. Yes, sir.

Q. How much have you invested in your business generally? Did you tell me? What is your capital investment? A. We have no capital.

Q. What do you do business on? How much? A. $20,000.

Q. Then you do business on $20,000, and $4,000 of that is invested in oil tanks and pumps, isn't it?

311 A. Yes, sir.

Q. Isn't that $4,000 investment an absolutely dead investment from the standpoint of return? A. Yes, sir.

Q. You never get a cent of that back? A. It is an asset on our books.

Q. Yes, it is an asset, but it never gets you any return at all, though, does it? You do not get any return out of that $4,000 investment, do you, other than gallonage? A. No, sir.

Q. If you could get that same gallonage without that $4,000 invested in pumps, wouldn't you be better off? A. We couldn't get it.

312 Q. Would you or would you not be better off? A. Yes.

Q. Yes. Now, if nobody invested capital in oil tanks and pumps under these lease agreements, neither you nor your competitors, none of you invested capital in oil tanks and pumps under these lease agreements and tying contracts, do you then say you could not hold your gallonage? A. No, sir.

Q. You say you could not? A. No, sir.

Q. That is the only way in which you can hold gallonage then, is because you enter into these tying contracts, is it? A. No, we must have a way to

market our stuff, and if you do not market it through these pumps, you must do it through filling stations, which are decidedly more expensive.

Q. You say you must put it through filling stations? A. Yes, sir.

Q. Did I understand you to say a while ago, or did I not, that you sell to other customers than those who lease or loan pumps—who have leased or loaned pumps? A. Yes, sir.

Q. How about filling stations? A. That business does not amount to anything.

Q. Then you really do not sell anything at all except through leasing stations? A. Well, of course, the business is done through the filling stations of the dealers. 314

Q. How many customers have you anyway? A. Well, I would say twelve.

Q. Twelve customers? A. Oh, no. I thought you meant pumps.

Q. No, I want to know customers now. A. I couldn't say to that.

Q. Oh, yes, you know; you are the owner of this company? A. I could not tell about that.

Q. Twenty? A. We will say twenty.

Q. Is that right in your best judgment? A. Oh, I would say it was more than that. 315

Q. Let us get a fair estimate then. A. Fifty.

Q. Now, you have fifty customers; of those fifty customers, twelve of them are under lease agreements; that is right, isn't it? A. Yes, sir.

Q. That leaves you 38 customers who are not under lease agreements. A. Yes, sir.

Q. Now, you testified a while ago that that business did not amount to anything; do you want to say now as to these 38 customers who are not under

316 *Thomas K. Brushart, Direct*

lease agreements that their business does not amount to anything in your opinion? A. We would not want to lose them, but they just fill in. They are not our big business. They are not what we have to get along with.

Q. How much in per cent do you sell to these 38; how much of your business—gallons? A. Twenty per cent.

Q. Twenty per cent; so that there are 38 customers who are not under leasing contracts who buy 20 per cent of your product; is that right? A. Or less;
317 they do not have more than that.

Q. Not more than 20 per cent. Now, you have no capital investment, however, with those 20 customers, have you? A. No, sir.

Q. Those 38 customers. A. The 20 per cent

Q. On the 38 customers' business, it yields you a greater profit in relation to your capital investment, and less overhead expense; isn't that right? A. Yes, sir.

Q. Now, you say you could not get the customers if you did not have leasing contracts; why is that? A. Well, so far as I know they would be in business.

Q. Do you mean to say that there would not be
318 any sale of gasoline in Ohio if there were no leases of oil tanks and pumps? A. No, sir.

Q. What do you mean to say about that? A. I say that the companies will set out to distribute oil to the consumer through the filling station, and these people probably would not be in business.

Q. How long have you been engaged in the oil business in Ohio? A. Since 1917.

Q. You do not know anything about the business prior to that time? A. No, sir.

Q. Do you know when leasing and loaning generally came into general practice in Ohio? A. I do not.

Q. Do you know whether or not there were curbstone pumps prior to the time when leases and loans were generally entered into by oil companies? A. I do not.

Q. You are not acquainted with the nature of the game at all, or were not in that time? A. No.

Q. What per cent of the pumps in your territory are leased or loaned by some company or other? A. I would say 90 per cent.

Q. 90 per cent? A. Yes. That is curb pumps, of course.

Q. What per cent was leased or loaned in 1917, 320
about, do you suppose? A. I don't know.

Q. You do not know anything about whether this per cent is on the increase or decrease? How many more pumps are there today than there were in 1917, do you suppose, in your territory? A. 50 per cent more.

Q. Fifty per cent more? A. I would think so.

Q. Why were 50 per cent more pumps put in your territory since 1917, than had been in before?

Mr. Rubrecht: If you know.

Q. If you know. A. I don't know.

Q. Isn't it a fact that they were put in because 321
retailers of gasoline would not buy their own pumps? A. That probably had something to do with it.

Q. You do not know whether it is or is not a fact? A. No, sir.

Q. Then you do not know at all whether the leasing or loaning of oil pumps is a necessity in this business, do you?

Mr. Rubrecht: He answered that awhile ago, I think.

Mr. Zechiel: I know he did. I want to know what he says now.

322 *Thomas K. Brushart, Direct*

Mr. Rubrecht: According to all ordinary rules that would be the end of it.

The Witness: I feel that it aids a business. It aids the distribution of gasoline.

Q. I do not think you answered the question. Read it to him.

(Question read.)

A. I do not know any figures on it.

Q. I do not care anything about figures. A. I say that I feel that it is necessary and you say that is not
323 an answer.

Q. I do not say it is not an answer. I do not say it is a good answer either. I want to know what your answer is. A. I feel that it is a good thing to loan the pumps.

Q. Oh, I do not want to know that at all.

(Question read.)

Mr. Holliday: What difference does it make whether it is necessary?

Mr. Zechiel: I think it makes a great deal of difference from the position this witness takes. I think if he will answer it it is very
324 evident.

Mr. Rubrecht: I thought the point here is, which is the best method, not whether it is necessary, but which is the best method.

Mr. Zechiel: If I have to go into the explanation of the reasons for this question, the witness testified it was the only way in which the distribution of this product could be made.

Mr. Rubrecht: Oh, no. He said it would aid the gallonage.

Mr. Zechiel: He said it was the only way in which he could get his gallonage. I do not

think he thinks so now. This man is an adverse witness. This is not a witness for the Commission.

Mr. Rubrecht: I know, but the question of necessity is entirely different thing.

The Witness: It is not a necessity.

Q. Then it is a fact that you would not have to lease or loan pumps in order to get gallonage? A. There would be other ways of getting it, yes.

Q. And you could get it without having those leases and loans at all, couldn't you? A. Yes, sir. 326

Q. Now, am I correct, that your only reason that you gave a while ago for the necessity of leases and loans was that it was in order to get gallonage and you could not get gallonage without it; you did say that, didn't you? A. Yes, sir.

Q. You are willing to modify that? A. We must either sell direct or through these curb pumps.

Q. But you might sell to a curb pump that is owned by a retailer outright, might you not? A. Oh, yes.

Q. Isn't it a fact that numerous customers of yours and customers of all your competitors own their own oil tanks and pumps as distributing agencies? A. Not a large number. 327

Q. Not a large number? A. No.

Q. Let me ask you this question; why don't they own their own oil tanks and pumps? A. The margin that they handle gasoline on is very small, and they do not feel like making the investment.

Q. In other words, they cannot afford to invest the amount of three or four hundred dollars in a curb oil pump; is that the fact? A. For what they would get out of it, is the way they usually express it.

Q. So that the small margin on the sale of gasoline products by the oil companies, allowed by the oil

companies, causes the oil companies to install oil tanks and pumps under lease contracts; is that it? A. That has something to do with it.

Q. Then in other words if your own company were to allow a larger margin, you would not have to lease or loan tanks and pumps because your customers could afford to buy them; isn't that true? A. That does not say they would buy them.

Q. They could afford; you don't know whether they would or not, then; what reason have you for saying they would not buy them if they had a large
329 margin? A. True they would if the business were profitable, if they made a margin large enough for them to make a profit on a small gallonage, which the usual curb pump man has. He does not run anything large. It is a few hundred gallons.

Q. Now, let me ask you this; isn't the pump paid for out of the sale and distribution of gasoline? A. I presume it is.

Q. So if your oil company installs this oil tank and pump you have to pay it out of the sale and distribution of gasoline; isn't that so? A. Well, so I presume.

Q. And if the retailer himself bought his pump
330 he would have to pay for it out of the sale and distribution of gasoline; isn't that true? A. Yes, sir.

Q. Is there any saving to the public then by the practice of loaning and leasing oil tanks and pumps? A. There may be.

Q. How is that? A. Well, whether it is correct or not, the oil companies as a rule think that the method used here is probably the most economical way that they can do it. It gives them a certain gallonage.

Q. You say the oil companies as a rule; do you know that to be true, that oil companies over the

United States or even in Ohio, as a rule, believe that to be the case, or is that only your guess about it? A. They all practice it. Those that are practicing it probably have that reason.

Q. You do not know whether they have that rea- or not? A. Oh, no. I probably have never talked to all of them.

Q. You probably do not want to say that at all? A. No.

Q. You do not know whether that is true about the rest of your competitors, do you? A. No, I don't.

Q. For all you know your competitors may each 332
one of them do it because the other does it; isn't that true? A. They could, yes.

CROSS-EXAMINATION by Mr. Rubrecht:

Q. Mr. Brushart, is there any phase of this question about which Mr. Zechiel has been interrogating you that you desire to explain more fully than simply the categorical answers yes or no, the short answers you have made? A. Yes, there is. I made the statement to a question here that I felt, and possibly the other companies, oil companies, felt, that the curb pump was one of the most economical and efficient 333
methods of distributing gasoline to the public from the oil companies' viewpoint. Now, if that is eliminated and the oil companies go back, have to build filling stations to get the gallonage that they have been enjoying, why then the more wealthy and powerful companies may monopolize the filling stations, will monopolize the filling stations, because the little fellow cannot reach them.

Q. What would be the effect of that in your opinion, Mr. Brushart, now, with reference to the amount of gallonage that would be sold by the larger companies

as compared to the smaller companies? A. It would tend to create a monoply in favor of the larger companies.

Q. In view of that then, Mr. Brushart, as I understand it, are you or are you not of the opinion that if the Commission should issue an order stopping this leasing and loaning of gasoline pumps and tanks, whether or not it would be preferable to then go to the agency proposition or to filling tank or filling station proposition or to continue as it is—which would you say would be preferable? A. Well, I don't know.

335 Q. Take it from the point of convenience to the public; which would be more convenient to the public in getting gasoline, by the method of the filling station and the agency proposition or the present system? A. Well, the curb pump answers a certain want, and that is, that everybody—you or I cannot sell everybody; and everybody has their own friends where they want to deal, and I think the little dealer enjoys a certain amount of patronage that the other cannot get as long as he can stay in business.

Q. And the little fellow hasn't the money as a rule to buy a pump or tank, has he? A. No.

Q. Therefore, it would in your opinion drive the
336 business into the hands of the large corporations, would it not? A. Yes, sir.

Q. And you little fellows would suffer from it? A. Yes, sir.

Q. Do you think it would be advantageous to business, to the industry to drive it all into the agency method, that is, appointing agents of the wholesaler? A. I don't know.

Q. You are in the business. Do you think it would be more advantageous and convenient and not any more expensive to install agents of yours throughout your territory, which would include the expense of

auditing, bonding and liability insurance and so on; do you think that would be advantageous over the present system or not? A. I couldn't say until I know what the proposition to create satisfactory agents would be.

Q. Are you of the opinion or not that in order to keep up your gallonage you would have to have some control over the output; isn't that right? A. Yes, sir.

Q. Now, suppose you had to make all of the men you had now out selling your product—supposing you had to make them all your agents, wouldn't it increase the expense of the product of your business—of the 338
sale of it I should say? A. Yes, sir.

Q. In other words the pump, the curb pump, is the utility for the little fellow and the filling station is the utility for the big fellow in the business; isn't that right? A. Exactly.

RE-DIRECT EXAMINATION by Mr. Zechiel:

Q. Do you understand that the order of the Commission is to drive out the business of the curb pump and put it into filling stations? A. No, sir.

Q. You do not understand the complaint to be based on that sort of theory, do you? A. I have not— 339

Q. It is not your understanding that there is any intention on the part of the Commission to prevent you from selling your product to a curbstone pump man, is it? A. No, I do not understand it that way.

Q. There is no reason is there as far as you can see why all the pumps that are installed today won't remain in installation even if the Commission does issue an order compelling you to cancel contracts of that sort, and everybody else in a competitive business in Ohio, cancelling contracts of that sort; you do not know of any reason why the Bowser Pump Company

340 *Thomas K. Brushart, Re-direct*

and the Wayne Pump Company and the Cincinnati Pump Company won't continue to sell pumps to these various garages and grocery men or why you still cannot sell pumps to those people; there is nothing to prove that, is there? A. Unless the storekeeper or the druggist, whichever you mention, does not feel that he can make the investment.

Q. But whenever he can make the investment he will buy the pump? A. I don't know that he will.

Q. You mean he won't? A. I don't know that he won't.

341 Q. If he can make money out of it do you mean to say he won't? A. He can't ever hope to make the money out of it that he makes out of his other line of goods.

Q. That is not the question at all. It is a question whether he can make money out of it. A. They feel they never have made any money out of them.

Q. Do you mean to say all the pump people in Ohio who own their own pumps are losing money at that game; is that your impression about the business in Ohio in the gasoline industry? A. I didn't say that.

Q. I thought you said that they could not make anything out of it. A. If a man is not making money, it

342 does not necessarily mean—if a man is not making money, it does not necessarily mean that he is losing money.

Q. Do you mean to say that you think that all these garage people and other retailers of gasoline who own their own pumps have made bad investments? A. I cannot see where they have made a very good one.

Q. You think they have made a bad investment? A. As a money making proposition.

Q. Do you think that the oil companies are making any money or not out of leasing and loaning oil tanks and pumps? A. Some of them feel that it is no more

than right that they should take the obligation of furnishing these pumps for the reason that the dealer is unable to make a fair profit on the handling of gasoline.

Q. Who controls the profit the dealers make? A. I don't know that.

Q. Who controls the profit your customers make? A. Well, there is no direct control except that they, in order to sell must meet competition.

Q. Who does that? A. The dealer, the fellow we sell to.

Q. I am asking who controls the profit which the customer makes? Is there nobody controlling that? 344
Who is responsible for the profit that they make? A. Well, we fix the price at which we sell to them. We say, "We will sell it to you at the tank wagon price. You can get whatever you can for it."

Q. If you fixed your price to them a cent less on gasoline, wouldn't that perhaps enable them to make a fair return on their investment, if they bought their own curb pump? A. I couldn't say that.

Q. Or two cents? A. I could not say that they would be satisfied with that.

Q. Would three cents? A. There isn't very many cents in selling gasoline.

Q. I am trying to find where this limit is. You say 345
that you can make money out of it as a dealer in gasoline, that you cannot only make money but you can afford to add a capital investment that does not even make any return to you of $4,000 out of a total $20,000 in your business, $4,000 that you can sink in oil tanks and pumps, and you say that you carry them; there is nothing physically impossible in your increasing the profit to the customers so that they can carry it, is there? A. That would change the whole economical arrangement of the thing. You would have to consider that.

346 *Thomas K. Brushart, Re-direct*

Q. That changes nothing that I can see except the price of gasoline to your consumers? A. Yes.

Q. That would be all that is necessary, wouldn't it? In fact if everybody in the whole State of Ohio would refuse to install oil tanks and pumps under lease or loan, and you would refuse to do so, it would not affect your gallonage a bit, would it? Wouldn't there be the same consumption by the public ? A. It would affect any individual gallonage, if he did not take means to get the gallonage through some other way, possibly another filling station or something like that,
347 if they would all quit furnishing pumps and pumps were to go out of existence.

Q. No, but you seem to assume that pumps are going out of existence? A. Well, we will need more pumps than we have today if they are not allowed to place them—

Q. If they need more won't they buy them? Won't it be economical to buy them if they need them, if there is a necessity for them? I declare I do not understand your position, Mr. Witness, when you say that dealers or retailers of gasoline canot afford to buy their own equipment, and yet you wholesalers of gasoline make so much money that you can afford not only to
348 run your own business, but to run theirs too. I confess I do not understand that position. (No reply.)

Q. Isn't it a fact that if you were to divide the profits it would settle all difficulty about leasing and loaning oil tanks and pumps; isn't that true; even on your own theory of the small amount of money that these retailers make, wouldn't it do that? I think you are mistaken about the number of pumps that there are that are owned by private individuals. I think the testimony of other witnesses will not bear you out in that particular, at least not all over Ohio. But if that were true, isn't it true that the whole difficulty could be

solved by a re-distribution of profits and leaving the fellow who uses the pump to buy and pay for it out of the earnings he makes on the gasoline you sell him; is that true, or is that not true? A. I am not prepared to say, I cannot answer that question.

GEORGE E. DRAWE was thereupon called as a witness, and being first duly sworn, testified as follows: 350

Direct-examination by Mr. Zechiel:

Q. What is your name and address? A. George E. Drawe, Cleveland, Ohio; 13091 Cedar Street.

Q. With what company are you connected? A. The Lubric Oil Company.

Q. What is your business with that company? A. Manager.

Q. Is that the Lubric Oil Company that is respondent here? A. Yes, sir.

Q. How long have you been connected with that company? A. Since the spring of 1919.

Q. Prior to that time what was your experience 351
in the oil industry, if any? A. None whatever.

Q. When was your company incorporated, if you know? A. About 1909.

Q. 1909? A. Yes, sir.

Q. Under the same name? A. Yes, sir.

Q. You are engaged in the general business of distributing refined oil and gasoline? A. And all petroleum products.

Q. In connection with that business you also lease and loan and sell oil tanks and pumps? A. We have and we do. The reason I make that statement is because of recent months we have sold them and not leased or loaned them.

352 *George E. Drawe, Direct*

Q. How long back have you sold them? A. That has been probably since spring, five or six months.

Q. Since that time have you ever lost any customers because you refused to lease or loan pumps? A. We have.

Q. Do you know from whom the customers bought their gasoline? A. Only from competitive companies.

Q. Do you know the competitive company? A. In each instance I cannot recall that.

Q. Do you know any of the competitors in any instance? A. I cannot state specifically only that we lost
353 customers because they could get that kind of an arrangement from some other oil company.

Q. Do you know whether such oil customers did get that arrangement from some other oil company? A. Not positively; I only assumed it.

Q. Did they any time you were negotiating the sale of your product to them say to you that their reason for not buying from you was someone else was furnishing them? A. Someone else would?

Q. Someone else would furnish a pump? A. Yes, sir.

Q. Subsequently you were unable to sell to those customers? A. Yes, naturally.

354 Q. And it is a fact that pumps were installed on those premises? A. I presume so, yes.

Q. You don't know? A. No, because our interest in the matter ceased with their refusal.

Q. What is your practice now in that respect? You say you sell them? I mean, more in detail about that sale practice. A. Our sale is a sale practice. Our practice is an outright sale where we can get it; on time payments if a man establishes his financial responsibility, on the part payment plan.

Q. How many pumps have you sold since you started that policy? A. I cannot state the exact number.

355

Q. Oh, just approximately? A. I should say in the neighborhood of fifteen or twenty.

Q. What is the general territorial area over which you distribute your gas? A. Why, the lake—what we call the lake district, from Paynesville to Toledo and down perhaps a county or two into the state you know. We have other territories in the state too, warehouse territories, but mostly confined to northern, central western Ohio.

Q. Where, territorially, were these pumps sold by you? A. Mostly in Cleveland and its environments.

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Q. Did you sell some out in what is generally called the smaller town portion around the City of Cleveland? You say the environments. A. Yes, that would be in a few instances that we have done that.

Q. You don't lease or loan any pumps now to anybody except under prior contracts? A. Except under prior contracts.

Q. How many of those prior contracts do you remember of? A. Approximately 125.

Q. What per cent of your business is done through these leased pump stations? A. Well, our business outside of Cleveland is done largely through them, I would say the greater percentage; it would be over 75 per cent.

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Q. In Cleveland, what is your experience? A. We have a number of filling stations and what deliveries we make aside from that to garages are largely on the leased pump arrangement. We have many individual customers who own their own equipment.

Q. Who are your competitors in Cleveland? A. The Standard Oil Company, the St. Clair Oil Company, the Great Western, the Canfield, Brooks, Columbia, and there may be one or two others. I mentioned the Standard Oil, didn't I?

358 *George E. Drawe, Cross*

Q. Yes. The St. Clair Oil Company does a business in other states than Ohio, doesn't it? A. I believe they do.

CROSS-EXAMINATION by Mr. Ford:

Q. Mr. Drawe, you have named some competitors. Those competitors named are in the territorial limits of Cleveland and vicinity, aren't they? You have other competitors in other territory? A. The competitors that I named—that is what I was asked, our com-
359 petitors, I presumed, in our territory.

Q. Now, you have other competitors, of course, in Toledo? A. We have, yes, other competitors in Toledo. Do you want those in addition?

Q. No, not necessarily. I just wanted to know. A. I said there may be others that I didn't think of.

Q. Have you any knowledge, or have you looked over the list of the fourteen respondents here against whom this complaint has been filed? A. I don't believe I have.

Mr. Zechiel: Do you want that list?

Mr. Ford: Yes, I would like to have the witness look at that list if you have it.

360

The Witness (examining list): Yes.

Q. Having examined this list, do you know whether or not there are competitors of your company engaged in the leasing and loaning of pumps at the present time, not named in the list? A. Yes.

Q. How many would you say, of the competitors that you have named? A. Why, four that I mentioned —five—well, the Standard Oil is on here—four.

Q. You would say that there are four not named in the list of respondents to this complaint that are en-

gaged in the business of leasing and loaning pumps and tank equipment? A. Yes, sir.

Q. Now, I will ask you to state, Mr. Drawe, whether or not a cease and desist order of the Commission would be a serious prejudice to your business in the event that the order took effect before a similar order was made and took effect against your competitors? A. Why, naturally; it would not be equitable.

Q. The invested capital of the Lubric Oil Company is today what, Mr. Drawe? A. What do you mean, all told?

Q. Yes, all told? A. Approximately half a million 362
dollars.

Q. I think you testified to the percentage of gallonage sold through leased and loaned pumps, did you; is that of record? A. Yes.

Q. If not— A. Not specifically but in a general way.

Q. How many filling stations have you? A. 160, I recall it.

Q. About 125 leased and loaned pumps, I think you said? A. Yes.

Q. Can you give us the approximate, aggregate cost to the company of the sixteen filling stations; that is, I mean the installation cost? A. I cannot. 363

RE-DIRECT EXAMINATION by Mr. Zechiel:

Q. Which of these companies—you say there are four that are competitors—which of these companies that you have named are the four that are not named as respondents?

Examiner McCorkle: Four additional, I understood you to say; four that are not named in here.

Mr. Ford: I don't think it is part of the witness's duty to name competing companies here—to furnish names to this Commission.

Mr. Zechiel: I don't think it is either, but certainly if he testifies there are four, he ought to go ahead and tell who they are. Let us have the record clear about that.

Mr. Ford: I want to protect the witness there, Mr. Examiner.

Examiner McCorkle: Oh, I don't think he would need any protection from his competitors
365 or that he would be injured. I don't think he would like to do it. I appreciate his position in wanting to do it, but when he is on oath and asked about it I don't see how he can very well refuse to do it.

Mr. Ford: The object of my question on cross-examination was not to fix a complaint against any other company.

Examiner McCorkle: I understand that exactly.

Mr. Ford: But simply to show the Commission that an injustice would be worked.

Examiner McCorkle: I see very well your
366 point.

Mr. Zechiel: There are 39 companies made respondent in these cases. It is possible some of these companies are respondents in similar cases. If we know who they are we will know whether they are or not. It is not fair to introduce evidence against the Commission's position here without knowing who these parties are and whether or not they are respondents.

Mr. Ford: The witness will not be able to answer that question.

Mr. Zechiel: Let us see if he is.

The Witness: May I hear the last question, please? I said four; I may want to qualify that. I don't see the St. Clair Oil Company.

Q. You don't know whether they are respondents in a similar proceeding, do you? A. I do not; I don't see the Great Western; I don't see the Columbia.

Q. The Columbia Oil Company? A. The Columbia Refinery. Did I mention Brooks?

Q. You mentioned Brooks as being one of your competitors. A. Well, I don't see them on here. That would only be three then.

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Mr. Myers: That is four.

The Witness: All right.

Q. Now, you testified that it would be to your prejudice were you ordered to cease and desist and these competitors were not. It is a fact, however, that you are not even leasing and loaning any more? A. That is very true. I do not say that we would not do it.

Q. You are not doing it now? A. We don't happen to be doing it now.

And thereupon, at 12:15 o'clock P. M. a recess was taken until 2 o'clock P. M. 369

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2 o'clock P. M.

After recess.

ELBERT J. SMITH was thereupon called as a witness, and being first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. What is your full name? A. Elbert J. Smith.

Q. What is your address? A. 118 Hartford Avenue, Canton, Ohio.

Q. With what company are you connected? A. With the Canfield Oil Company.

Q. What is your position with the Canfield Oil Company? A. Manager of the Canton branch.

Q. Is that the Canfield Oil Company that is one of the respondents in this proceeding? A. I think it is. The Canfield, of Cleveland, Ohio.

Q. How long have you been connected with that company? A. Since July 1st, 1919.

Q. What is your experience in the oil industry, prior to that time? A. About eight years.

371 Q. With what company? A. I started with the Freedom Oil Works and the Standard Oil Company.

Q. You started with the Freedom Oil Works? A. Yes, sir.

Q. How long were you with that company? A. About nine months.

Q. When did your service of nine months with the Freedom Oil Company terminate? A. That was about eight years, not quite eight years ago.

Q. 1911 or '12? A. Yes.

Q. And after that time you were with what company? A. Standard Oil.

Q. For how long? A. A little over two years.

372 Q. And then? A. With the Canton Oil and Grease Company.

Q. What was the business of the Canton Oil and Grease Company? A. Marketing petroleum products.

Q. How long have you been with that company? A. Four years, a little over four years.

Q. Does that include all the time up to your present employment? A. Yes, sir.

Q. Mr. Smith, while you are with the Freedom Oil Works, did that company, to your knowledge, lease or loan any oil tanks or pumps? A. No, sir.

Q. While you were with the Standard Oil Company of Ohio did that company lease or loan oil tanks or pumps? A. No, sir; not so far as I know.

Q. While you were with the Canton Oil and Grease Company, did that company lease or loan oil tanks or pumps? A. They did not.

Q. While you were with the Canton Oil and Grease Company did your competitors lease and loan oil tanks and pumps? A. Yes, sir.

Q. Who were your competitors at that time? A. Standard Oil.

Q. Any others? A. Freedom Oil Works, National Refining, Oil City Oil and Grease. 374

Q. Any others? A. No, that is all that marketed gasoline.

Q. Did all these companies who were competitors of yours at that time lease and loan oil tanks and pumps? A. I don't know that they did.

Q. While you were with the Canton Oil and Grease Company, did you ever lose any customers because you refused to lease or loan them tanks or pumps? A. I don't know that we lost any of our own customers, but we could have probably sold some that we didn't sell.

Q. Did you ever solicit a garage man or other 375
vendees of gasoline and were refused because they were under contract with competing companies? A. Yes, sir.

Q. Was that a frequent occurrence or not, in your experience? A. No, sir.

Q. Did you frequently solicit customers of competitors of yours who have had these lease contracts? A. I have solicited them a few times and found they had a contract, and I didn't bother them.

Q. After that you didn't bother them any more. What is the capital investment of the Canton Oil and Grease Company? A. Capital stock?

376 *Elbert J. Smith, Direct*

Q. Yes. A. $10,000.

Q. With whom was your trade when you were with that company, in a general way? A. Mostly with the garage trade. There were five of the leading garages in the city that owned our company.

Q. And you sold gasoline to no one else besides those companies? A. Yes, sir.

Q. Those garages? A. Yes, sir.

Q. Over what was the territorial extent of your business? A. Not outside of Stark County.

Q. Not outside of Stark County? A. Not out-
377 side.

Q. Now you say you don't lease or loan oil tanks or pumps—I mean the Canton Oil and Grease Company—didn't while you were with that company? A. No, sir.

Q. Do you know why they did not engage in that practice? A. Our stockholders were mostly gasoline owners, sellers themselves; they didn't care to help the other fellow sell, I guess was one principal reason.

Q. You don't understand by leasing and loaning them they would help other people sell? A. Well, it seems to me if we furnish a storage for any cus-
378 tomer we are helping that man to sell gasoline.

Q. Oh, you mean other customers than your own garages? A. Yes, sir.

Q. I understand. A. Our own garage men had their own pumps when the company was organized.

Q. Did you sell any gasoline to any trade that was outside of the general trade territory or scope of these five garages in this city? A. Well ,yes, we did, some. The trade would come in to them. We made a few of those little towns, small towns, with our truck.

Q. The owners of your company were not doing

business themselves individually in those smaller towns? A. No, sir.

Q. Do you know why your company didn't lease or loan oil tanks and pumps in those smaller towns? A. They were not interested in the sale of gasoline only for themselves. They were not interested in expanding. The company was organizd to take care of the trade for themselves and they were not interested in expanding.

Q. They did make these towns? A. Oh, yes.

Q. During the time that you were connected with the Canton Oil and Grease Company, did that company ever sell any oil tanks and pumps? A. Yes, sir. 380

Q. Where did they sell those? A. Mostly to our stockholders. When one of our customers would want an outfit, we would buy it generally at a cash sale.

Q. Did you sell any other than to your stockholders? A. I don't remember that we did.

CROSS-EXAMINATION by Judge Chamberlin:

Q. The Canton Oil and Grease Company is not now an operating company, is it? A. No, sir. 381

Q. When did it cease operations, and why? A. Well, the Canfield Oil Company bought us and took us over the first of July this year. I said, no, sir. I am not sure their charter has been surrendered, but there is no Canton Oil and Grease Company.

Q. You are not operating now under that name at all? A. No, sir.

Q. When you were operating as the Canton Oil and Grease Company you were simply a local jobber, were you? A. Yes, sir.

Q. At Canton, Ohio? A. Yes, sir.

382 *Elbert J. Smith, Cross*

Q. What was the capacity of your company to handle gasoline? A. You mean—

Q. About how much— A. The quantities?

Q. Yes. A. We run from 75 to 100 thousand gallons of gasoline monthly, and then the trade which we had in lubricating oils.

Q. Did you give particular attention to oils and greases other than gasoline? A. We did.

Q. You speak of the five leading garages as being stockholders in the Canton Oil Company? A. Yes, sir.

383 Q. What ratio of business done, just as a rough estimate, did you or those five garages do in Canton? A. Oh, I think a little better than 50 per cent.

Q. A little better than 50 per cent? A. Yes, sir.

Q. Did you handle any particular brand of gasoline? A. We called it a brand of our own name generally.

Q. Did you advertise it? A. Not extensively; we didn't advertise.

Q. Have you had any experience in the matter of selling or furnishing under lease or loan, pumps and tanks, since the Canfield Oil Company bought the Canton Grease and Oil Company? A. I have not,

384 with the exception of one Mr. Neide had sold on the installment plan.

Q. Was that an outright sale? A. Yes, sir.

Q. That was at a profit? A. Yes, sir.

Q. From the experience you have had in marketing, what would you say of the economic value of the use of pumps and tanks by lease or loan for the service of the public and the reduction of the cost of distribution? A. Well, it rather appealed to me, the only thing, from the advertising standpoint, and I believe it gives the public a little better service than it does the other way. I don't know.

Q. Why does it appeal to you from the advertising standpoint? A. It pays to advertise, I think. I don't believe it pays to market any gas unless you advertise it. I think that is one of the better ways to advertise. When a man wants gasoline, he is hunting for a pump and he sees that out on the pump.

Q. Is that practice pretty generally adopted by the business generally at the present time? A. Well, I don't know. It is locally with us, I think.

Q. How many years did you say you had been in the marketing end? A. It has been eight years since I commenced, about eight years. I have been off. 386
I have not marketed oil all that time, quite.

Q. You at that time, however, marketed for the Freedom Oil Works? A. Yes, sir.

Q. Standard Oil Company? A. Yes, sir.

Q. Canton Oil and Grease Company? A. Yes, sir.

Q. And the statement that you make now as to the economic value of advertising and distributing is a result of your experience thus gained? A. Yes, sir.

RE-DIRECT EXAMINATION by Mr. Zechiel:

Q. If I understood you correctly, you said you thought that advertising through the pump was an 387
economical advantage? A. That is my understanding; that is my way of looking at it.

Q. Do you see any reason why that advertising through the pump cannot be done without leasing or loaning the pump, or is it in your opinion necessary to lease and loan pumps in order to advertise? A. Well, if the other fellow owns the pump, it is harder to get it done I think; it is harder anyhow to put it on somebody else's property than it is our own property.

Q. Do you think if he were selling your product and it is good business for you to advertise your prod-

uct, that it would not be good business for him to advertise your product? A. I don't think he advertises it with us locally.

Q. I don't think you answered my question. A. Yes, as I understand the question now, I think it would be a good thing for him to do if he would do it.

Q. Then you think that he, in his business sagacity, would not be likely to appreciate the advantage of that advertising if it is an advantage? A. Of our advertising?

389 Q. Of his advertising your goods? A. Well, I think the man that markets the gasoline generally through the curbstone pumps is not interested very strongly in the gasoline and I do not believe he advertises in our country—in our section. Now, if you could get him to advertise it with his own name or something today, it might help it. I don't believe he is interested in advertising our brand.

Q. He is interested in selling it. A. He sells it as a side issue generally.

Q. If he is selling it as a side issue, he is engaged in that business, isn't he? A. Yes, sir.

Q. If it is to your interest to advertise and he has
390 his agency through which you sell, isn't it to his interest to advertise? A. It would be, if you could get him to see it.

Q. Have you ever tried to get him to see it? A. No, sir, I haven't.

Q. Have you had any experience along that line at all? A. No. I say it is my own supposition.

Q. You never really investigated it at all though, yourself? A. Never tried to get any one to advertise our goods.

Q. No one ever turned you down at all when you did try to get him to use your gas and advertise them? A. For him to advertise them?

Q. Yes. A. I never tried to get anyone to advertise our gas.

Q. Isn't it a fact that before this system of leasing or loaning pumps came into use that the garage men and retailers of gasoline did not put any sign on the pump showing the brand of the gasoline? A. I don't know; I don't believe they did; I don't remember that they did.

RE-CROSS EXAMINATION by Mr. Chamberlin:

392

Q. Well, as you stated a moment ago, usually the curb pump is merely a side issue to some principal business, isn't it? A. Generally so, with us.

Q. That is true in the territory with which you are familiar? A. Yes, sir.

Q. And being a side issue it would not claim first importance in the consideration of the owner? A. No, it is a side issue with him.

Q. And if you had no contractual relations with him or agency with him you could not require him to advertise your goods? A. I don't think so.

Q. And it is your opinion that he would not advertise your gasoline or anybody else's gas? A. I 393
don't think he would.

Q. As long as it was a mere side issue? A. Yes, sir, I don't think he would.

Q. He would not be inclined to keep it separate from anybody else? A. I think not.

Q. The consideration on the part of that kind of an independent dealer is to buy the goods he can make the most margin on, taking advantage of the man who stops, or is compelled to stop and fill at his station? A. Yes, sir, and buying when his requirements need.

394 *Elbert J. Smith, Re-direct*

RE-DIRECT EXAMINATION by Mr. Zechiel:

Q. And it is a fact that when a man is independent, he does buy what his requirements demand? A. Well, he generally has his place of buying. He is generally taken care of and—

Q. (Interrupting.) And in answer to Judge Chamberlin's question—

Judge Chamberlin: Let him finish his answer.

395 Mr. Zechiel: Certainly, if he has anything more to say.

The Witness: We generally have our regular customers. He is generally taken care of regularly. If he is missed or passed up he generally calls up his company that he buys from. If he doesn't get service here of course he is free to buy from any place he cares to.

Q. What is your answer then to Judge Chamberlin's question, that these customers do or do not buy from anybody that comes along? A. Well, I think they generally have their own distributors to buy there.

396 Q. And they generally buy from just anybody? A. No, not generally.

Q. That is a very rare thing to do, isn't it, in the gasoline trade? A. I don't know I just understand. It is a rare thing to do, to buy from everyone who comes along?

Q. Yes. A. I should say it was, with us. We pretty nearly have our customers and unless they have some reason, they do not generally change.

Q. And you also said that in your opinion your customers would not be influenced in advertising and

would not advertise because it is a side line. It is true, however, that you don't know anything about that, from your own investigation? A. No, sir, not my own investigation. That is just my supposition.

A. S. HICKOCK was thereupon called as a witness, and being first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. What is your address, Mr. Hickock? A. 401 398
Nasby Building, Toledo, Ohio.

Q. With what company are you connected, Mr. Hickock? A. The Hickock Producing Company.

Q. Is that company one of the respondents in this proceeding? A. Yes, sir.

Q. What is your position with that company? A. President and treasurer.

Q. And how long have you been in that position? A. Since it was organized, in 1913.

Q. What was your experience, if any, in the oil industry prior to that time? A. None whatsoever. I was in the department store business.

Q. Does your company also lease or loan oil tanks 399
and pumps in connection with its business? A. We have.

Q. Do you now? A. No, sir.

Q. How long since you ceased to loan pumps? A. July 1st, 1919.

Q. Prior to that time how long had you leased and loaned pumps? A. Why the first four years we were in business we were producers of casing heads. About two years ago we started marketing motor gas, using casing heads and other products as a blend, and for the last two years we have been marketing motor

gas in Toledo and vicinity made from our casing head and other products. About the time we first started in the field to market our goods in Toledo our city man who went out had trouble in securing business due largely to the fact that the companies owning their own pumps were handling a particular kind of gas that they had been handling for a number of years and were satisfied and would not put in the new gas that they knew nothing about. And as a result of that we were forced to lease some pumps in order to get an opening, to get our product introduced.

401 a new company just starting in business, trying to market a new product, it is absolutely impossible, our experience was, to get that article introduced without you adopted a method of that kind. Of course, there are advantages and disadvantages connected with it. Most of the customers who are using pumps are small operators, as the larger companies and garages prefer to own their own outfits. They having their own pump, as I said before, and having a gas that is satisfactory, are not interested in changing. And our experience was to get that first start, we entered into leases and put in the pumps and tanks when we first started in business.

402 Q. So if I understand you correctly, do you mean that you found that the prospective customers were divided between those who owned their own oil tanks and pumps, and those who were lessees of oil tanks and pumps? A. Yes, sir.

Q. That you were unable to sell to either class of customers? A. Either class of customers, that is, unable in any volume, to amount to anything. We would now and then pick up someone for a few gallons, but for the first few months there was, you might say, nothing to do.

Q. You say that your product was a new product on the market? A. Yes, sir, unknown. It was an entirely new product. We put it out under our own name. We claimed a superior product at the same price as the other.

Q. Now, since 1919, last July, was it, you say you ceased leasing and loaning? A. Yes, sir.

Q. What is your method of distribution now,if you have any? A. Through our filling stations, principally.

Q. And you do not deliver to garages at all any more? A. Well, we sell some pumps occasionally. 404
We have some garage customers. During these two years, understand, we have picked up in the natural course of business, some garages that have our particular gas, that own their own pumps. We have secured that business during the last two or three years.

Q. How large a business was that? A. How large was what business?

Q. That you have just described, the business you picked up from garages who own their own outfits? A. I could not give you any idea as to that.

Q. I think you can give an idea? A. Oh, it would be impossible. I couldn't give you any idea as to that. I couldn't give you any idea as to that. Our 405
biggest business is done through our own stations. After we got into our game, we saw there were two ways of marketing the goods, through our own stations or using the pumps of other people, and we decided that using our own stations was the preferable way for our particular line of business.

Q. Today about what per cent of your product goes through your filling stations? A. Well, it is hard to say what per cent. The biggest per cent of it.

Q. Seventy-five? A. Fully as much as that.

Q. Let us get it as nearly correct as we can. Seventy-five to eighty per cent? A. It would be impossible to give you a correct estimate. I said the big per cent of it.

Q. I am merely trying to fix a figure that is fair to you and everybody else. Is seventy-five fair to you? A. I wouldn't say. It might be seventy-five; it might be ninety.

Q. Would you say from seventy-five to ninety? A. I would estimate it at that.

Q. At from seventy-five to ninety? A. Yes.

407 Q. During your experience in the marketing of your product, did you ever try to sell gasoline, your product, to a prospective customer who refused to buy for the reason that, he so stating at the time, he was under contract obligation through a lease to buy his gasoline from a competitor of yours? A. Well, of course I had a man that looked after that business and the reports that we got back, as I remember, at the start, were that they were not interested in our gasoline, as they didn't know anything about it. They had been handling a certain gasoline that was satisfactory and they didn't want to change.

408 Q. So far as you remember or have any knowledge, nobody refused to buy from you because of the lease agreement that they entered into with competitors? A. Possibly that might have come up. I won't say it did not because it may have done so. But the majority of cases was because the gasoline was not known.

Q. What is your experience now with respect to garages who owned their own pump and outfits; can you market your product through those outfits, and do you do so? A. We have quite a good many very good customers that own their own outfits and we are selling gasoline to them, yes, sir. But those customers

we were unable to secure early in the game, we are now selling. They would not listen to us until the gasoline was known and introduced. And we introduced it through the leased pumps to start with.

Q. Are you now unable to sell gasoline to prospective customers, they giving as their reason that they are under contract obligation to use the gasoline of a competitor of yours, if you know? A. No, we haven't had any trouble of that kind, to my knowledge.

Q. To your knowledge? A. No.

Q. At the time you were leasing and loaning pumps, or selling same to some of your customers—I believe 410
you did testify you do sell some now? A. Yes, sir.

Q. Where did you buy those pumps and tanks? A. From the Guaranteed Liquid Measure Company, at Pittsburgh.

Q. Do you have those sent to your customers direct? A. Never. They were always billed to the Hickock Producing Company. We carried them in stock.

Q. You carried them in stock? A. Pumps and tanks in stock.

Q. When you were ready to install them you sent to the stockroom and took one of them out and installed it? A. Yes, sir. We had our own men for 411
installing them.

CROSS-EXAMINATION by Mr. Taber:

Q. You say you have ceased to lease any more after the first of July? A. After the first of July.

Q. I will ask you whether you ceased to do that after you had received a letter from the Federal Trade Commission declaring this to be unfair practice, or calling your attention to it? A. I did.

Q. Now, when you started in, this blended casing head gasoline was an unknown quantity in motor fuel in Toledo, wasn't it? A. Absolutely.

Q. And you started in by leasing tanks in which to store this particular gasoline for the trade. I will ask you if, following that, you started out on a campaign of advertising, advertising this particular gasoline? A. We did.

Q. Under what trade name have you sold this? A. High Speed.

Q. And upon each of these pumps, curb pumps,
413 that are in where you are handling that gasoline, that sign appears on it, doesn't it? A. It does.

Q. Do you consider that is an asset in your business? A. I do.

Q. Now, you have several filling stations around town? A. We have.

Q. And you have some out on Dorr Street, haven't you? A. Yes, sir.

Q. I will ask you if at any time it has come to your knowledge where inferior grades of gasoline or fuel oils have been mixed with your product? A. We have had one occasion particularly called to our attention where that has happened.

414 Q. You may state under what conditions that happened or took place? A. It happened along early in the spring, I think it was. A station where we had one of our pumps with our globes on, and further down on the street we had one of our regular filling stations. This was a garage, possibly a mile further up on Dorr Street and the men in charge of our filling station had customers coming in complaining that the gasoline we sold at different stations was not uniform. On questioning one of them he referred to the garage above. He said he had lived up that way and

had been getting gas there for sometime but of late he had had trouble and he had been coming down to this station and he said that was all right. After having that called to my attention on several occasions, I took occasion to investigate and I was informed that occasionally he would—our truck would come along and put in a couple of hundred gallons and the next day when it would be getting low he would put in a like amount of this other grade of gas, which was a cheaper grade of gas that he could buy at a less price because it was of inferior quality. The result was that he was losing customers and we had to inform our customer that unless he wanted to use ours—either take off our globe and sell it as the other gas or discontinue selling him. 415 416

Q. I will ask you in your opinion, in order to maintain your reputation on this brand of gasoline, if it is practicable to sell that to any garage or any buyer that is liable to mix it with other grades of gasoline or motor fuel? A. If it is practicable—

Q. Yes. A. Absolutely not. They don't blend.

Judge Chamberlin: I don't think he quite understood you, did he?

Q. I thought you said it was impracticable? A. It is impracticable to run two together. Our gasoline does not blend. Our gasoline will not mix with the other grades which show a kerosene content and the car owner will immediately notice it. 417

Q. I will ask you what the effect of getting your gasoline mixed up with other and inferior grades would be upon the trade name or your business? A. It would absolutely ruin it.

RE-DIRECT EXAMINATION by Mr. Zechiel:

Q. Mr. Hickock, with reference to your mixing and advertising scheme, it is not impossible for you to require of your customers to put signs above their pumps that they sell your gas, even though the pump does not belong to you? A. You mean do we require them to do that?

Q. Yes. A. Oh, no, no.

Q. You will sell to parties even if they do not put a sign above their pump? A. We would not sell them
419 if we thought their product would be mixed with ours.

Q. Would you sell it if it were not being advertised as your proposition? A. Well, we never had that case come up.

Q. Would you now? You are the president. If somebody wanted to become a customer of yours but didn't want to advertise that brand of gasoline, would you sell him gasoline? A. Not unless we had a surplus and we wanted to get rid of it very bad. At the present time we wouldn't do it because we sell all we make without doing it.

Q. So now you require your customers to agree not to use any blend at all but your product exclu-
420 sively? A. No, we don't require them because that has never come up.

Q. But that is your policy, however? A. Yes, sir. We pride ourselves we put out a quality of gasoline that is exceptionally good and we are trying to maintain that standard.

Q. Is it a fact or not that many of your customers do use your globe signs up there above their pumps —is that what you use, a globe sign? A. Yes.

Q. I am just assuming that because I think that is what is generally used? A. I think practically all of our customers use it.

Q. That is true whether your customers own the pumps or lease them, isn't it? A. Yes, sir.

JOHN S. SHEEAN was thereupon called as a witness, and being duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. What is your name? A. John S. Sheean.

Q. Where do you live? A. Cincinnati, Ohio, 873 Academy Avenue.

Q. With whom are you employed? A. S. F. Bowser & Company, of Fort Wayne, Indiana.

Q. What is the S. F. Bowser Company? A. Manufacturers of oil tanks and pumps, self-measuring.

Q. As salesman, do you have charge of a particular 422
territory? A. It is composed of Butler—

Q. Just in a general way? A. About eight counties.

Q. In what part of the state? A. In the southwestern, missing Hamilton County.

Q. What is your general plan and method of selling your company's product? A. My plan is, of course —runs along on the same line as general salesmanship does, calling upon the trade which would be liable or likely to use any of our commodities, and try to show them the advantages of having something of that character to increase their business and minimize the losses to such an extent that it would be a 423
profitable proposition to them to purchase an outfit of that character.

Q. In that regard do you call upon numerous persons throughout your territory over which you are supervisor? A. Any person who handles oil in any manner at all, whether they handle it for sale or for their own individual use.

Q. In case you sell some one a pump, how is that pump delivered? A. In case I sell a pump, the order is taken; the order is sent to Ft. Wayne; they pass

424 *John S. Sheean, Direct*

upon it, and deliver it, I suppose at their earliest convenience.

Q. Directly from the factory? A. Directly from the factory to the customer.

Q. How long have you been employed by the S. F. Bowser Company, Mr. Sheean? A. It is pretty hard for me to tell; I guess along about between twelve and fourteen years.

Q. During that time how much of your employment was in the State of Ohio? A. All of it with the exception of possibly three months in Illinois and about
425 three weeks at Ft. Wayne, and about four or five weeks in Kentucky.

Q. Have you always been in the same territory in which you are now employed? A. Well, no, before the first of this year I was always in Hamilton County.

Q. For my own information, where is that? What part of the State is Hamilton County? A. Cincinnati.

Q. During all that time you have solicited and sold oil tanks and pumps for the S. F. Bowser Company to various parties in your territory? A. Yes, sir.

Q. Are you acquainted with the practice of leasing and loaning oil tanks and pumps to various garage
426 people? A. No, only what I have been told by people with whom I come in contact with reference to the sale of the outfit, they have intimated that they would not buy because they could get an outfit for nothing or on a lease.

Q. From your experience and your observation, when did that kind of practice first come into your territory? A. I do not really recall; it has been quite a little while ago.

Q. Would you venture a guess as to when in years: say three or four or five or six? A. About three or four years, I guess.

Q. Have you ever tried to sell a customer an oil tank and pump who refused to buy, he giving the reason that he could secure such an outfit by loan from someone else, an oil company or otherwise? A. Yes, sir.

Q. Has that happened frequently or not in your experience? A. Well, it has happened possibly fifteen or twenty times to my knowledge.

Q. You are very well acquainted in a general way with the oil tanks and pumps and their distribution throughout your territory? A. Yes.

Q. What is your best estimate as to the number 428
of oil tanks and pumps that have been sold to retailers of gasoline as compared with those that have been leased and loaned during the last three or four years? A. I could only say that in our part of the territory.

Q. That is in Hamilton County? A. Yes, sir.

Q. You are speaking of that? A. Yes, sir.

Q. Well, in Hamilton County? A. I guess it would be about 33 1/3 per cent of the outfits sold—now, you want to bear in mind that it would not be all the outfits that were sold, because, as a rule, these outfits that are leased are largely to public garages, and I do not recall of any case where they have ever been leased to private garages. 429

Q. Then, if I understand you correctly, about 33 1/3 per cent of those that are distributed today —I mean that have been distributed and are now in place in the various public garages, have been sold to those garages? A. Yes, sir.

Q. What, in your opinion, has been the effect on the sale of oil tanks and pumps of the practice of leasing and loaning such pumps by various oil companies? A. I do not understand your question.

(Question read.)

A. Demoralizing to the salesmen.

Q. Has the relative proportion of pumps sold to garage men increased or decreased in the last two years, say? By "relative proportion" I mean relative to the number that have been leased or loaned? A. In the last year I have not had much—in fact I could not make any statement in regard to that, with the exception of one.

Q. In the year prior to that time, as compared with the previous years? A. Let me understand your question again, please.

(Question read.)

A. I think they have increased.

Q. The sales are increasing? A. Yes, because I do not believe they are leasing many of them.

Q. Do you sell oil tanks and pumps to private individuals for their private use? A. I try to.

Q. I am asking you whether you are successful? A. Not very.

Q. You do sell some? A. I have sold some.

Q. To what class of retailers generally do you sell your products? A. As I stated a while ago, to anyone who uses oil in any manner at all.

Q. Those are parties you solicit? A. Yes, sir.

Q. But I am asking rather particularly with reference to your success? A. Paint stores and garages, private garages, groceries who handle kerosene or gasoline, and some factory business.

CROSS-EXAMINATION by Mr. Taber:

Q. Mr. Sheean, you have a contract with the Bowser Company, haven't you? A. Yes, sir.

Q. Does that contract give you the sale of all their product in that territory? A. All with the exception of one order.

Q. What is that? A. That was an order that was taken in Columbus and was shipped into my territory and I got half the commission on it.

Q. But aren't there certain jobbers and dealers that are excluded from your contract? A. Not in my territory.

Q. Not in your territory? A. No, sir.

Q. Did you ever take the matter up with your company that these pumps were being sold and given 434
away or given to the dealers in your territory? A. I might have taken that up with them some time ago; I may have wrote them a letter once.

Q. Do you know that your company is selling these very pumps and tanks that are being leased and given away, or the use of them furnished? A. I don't know a thing about what they are doing with them, other than what I sell.

Q. Don't you know that the Bowser pump is furnished to the dealer upon a lease, the same as any other pump is? A. How do you mean?

Q. Any other make of pumps, that Bowser pumps are being leased— A. I don't know a thing about 435
what they do with them after they get them; a man could buy a pump from me and sell to somebody else, and that man may lease them.

Q. So that your company is getting the benefit of all the tanks and pumps which it sells to refiners and jobbers in the oil business, which the jobber or refiner afterwards leases or loans? A. The company may get that, but the salesman does not. I do not know a thing about what the company does with their end of it.

436 *John S. Sheean, Cross*

Q. Do you know of any commissions that you have lost by reason of these tanks and pumps coming in there? A. I do; yes, sir.

Q. What ones? A. At Xenia, Ohio.

Q. Was that in your territory? A. Yes, sir.

Q. Who was that pump leased to? A. Why, the pump wasn't leased.

Q. What was done with it? A. The situation was simply this: I called on a gentleman at Xenia, and he told me that a man who had previous represented Bowser & Company had called upon him, and he was
437 interested in Bowser equipment, and he gets in touch with the Springfield Oil Products Company and gets them to agree, or he told me he had them agree to put in this pump for him. I go over there to see them, and he comes back and the Springfield Oil Products Company was to sell him the pump outright, and that was the agreement that was made. So when I came back about four or five weeks afterwards, thinking that Bowser equipment would be placed in front of that man's place, another equipment was placed there, but it was made in Dayton, Ohio, and I lost the sale of it through the fact that the Springfield Oil Products Company undertook to give him that pump
438 under certain conditions. That condition was for so much a month, running possibly for two years.

Q. Then they were selling another pump in competition with the Bowser in that case; is that right? A. No, sir; they did not hold up to the agreement, that was made by the Springfield Oil Products Company and the man who was to buy, and the man didn't wait any longer and he goes to Dayton and buys a pump, and had the Springfield Oil Products Company kept out of it, I could have sold the man a Bowser equipment, and I could have had my commission.

Q. Then they did not carry out their agreement to sell that? A. Yes, sir.

439

Q. So your prospective customer went over to Dayton and bought one himself? A. The situation, as I stated a while ago, was the oil company was anxious to get that pump in there and had made a contract with them at a certain figure per month, to run a certain number of months to pay for that outfit.

Q. Now, they did not carry that agreement out? A. No, sir.

Q. That threw the man in Xenia right back where he was before he started? A. Yes, sir.

Q. So he was free to buy then where he pleased, and now is? A. The man in Xenia?

440

Q. Yes. A. Why, sure he could.

Q. And instead of sending word to you that he wanted a Bowser pump he went and bought another make of pump; is that right—the Xenia man? A. The Xenia man bought another make of pump.

Q. And he was under no obligations to the Springfield Products Company at the time that he bought this Dayton pump? A. No.

Q. Do you know how long a time it was after you were there until he bought this other pump? A. No.

Q. How? A. Well, about six weeks.

Q. And you were not in that territory at that time? A. No. When I came back, I found the other pump sticking up.

441

Q. So all the complaint you had is that the commission had gone to the fellow who had sold the Dayton pump? A. He beat me to it.

Q. Is there any other similar case to the one I mentioned? A. No, that was the only one. I thought I would get that out of my system.

Q. You feel better now? A. Yes, sir.

Q. That is the only case now that you know of that you have been beaten out of the sale of a pump? A. I have stated this year.

442 *John S. Sheean, Cross*

Q. Then this year is closed up. Now, let us go back into 1918; is there any one in 1918? A. I cannot recall their names, but there have been a great number of pumps placed or leased for a dollar a year in my territory.

Q. What make of pumps were they? A. I think the majority of them were Gilbert & Barker.

Q. Were there any Bowsers? A. I don't know of any.

Q. You don't know? A. No.

Q. Was there anything peculiar about the way in
443 which these other pumps— A. (Interrupting.) They were handled through an oil company.

Q. Through an oil company? A. Yes, sir.

Q. Where at? A. At Cincinnati.

Q. At Cincinnati, and you do not know anything about the terms under which they were sold? A. Other than what was told me by the people who made those deals.

Q. So you were merely meeting the competition of other people in the same vicinity that were selling pumps? A. I could not meet that competition.

Q. Oh, you could not meet it? A. Oh, no.

Q. So then the fellow that was putting the pumps
444 in was profiting by this deal? A. He may have been profiting in a way by taking the profits from somebody else.

Q. Who was he taking the profits from? A. Why, from the individual salesman that tried to sell the pumps direct to the purchaser.

Q. That is, through taking the commissions from you that you thought you might have had a chance to have gotten? A. I may not have sold him; it might have been some other salesman.

Q. But that is the only party that is hurt in all this transaction, is yourself; is that right; you are the

only loser? A. I don't know whether I would be or not. This other is concerned; there are about 2,000 men at Ft. Wayne depend largely upon what the salesmen send in there for a livelihood.

Q. But the only one directly affected by the sale of these pumps in your territory is yourself, isn't it? A. No, sir.

Q. It is not? A. No, sir.

Q. Now, these other pump companies have agents out, too, don't they? A. I don't know nothing about 446 how they handle it.

Q. You might not have gotten a single one of these orders; isn't that a fact? A. I would have got ninety per cent of them if the oil company stayed off of them.

Q. How do you know? A. Because I was getting them before they come in there.

Q. So you lost these sales? A. Yes.

Q. How many of them? A. Oh, I got tired of counting them, they commenced to come so fast.

Q. You must have had a pretty good number then. How many? A. Oh, I guess they would run—I guess the oil companies put in around sixty or eighty 447 a year.

Q. Now, name the parties that they were put in for? A. That would be impossible for me to do.

Q. Name any of them. A. There is one on Ninth Street, right east of—I guess it was not on Ninth Street; there is one on Liberty Street right near Lynn. I do not know the name of the party.

Q. What is that? A private pump or a garage? A. A public garage; I think it is on Liberty now.

Q. You are not even sure where that is located, are you? A. No, sir.

Q. You cannot name the party? A. No, I haven't got that name.

448 *John S. Sheean, Cross*

Q. Could you name any other? A. I did have a list, that is, I did have the names of them. I do not know whether I could recall them or not, get them correct, but I know—

Q. Now, you say you never took interest enough in this to even report it back to your company? A. I think I did at the time. My daily reports might recall that I failed to sell so and so on account of the conditions that existed.

Q. Can you remember a single instance where you made that report? (No reply.)

449 Q. Not one? (No reply.)

Q. Now, I will ask you whether or not there are more pumps being used under the leasing system and other ways than there were two years ago; has the number of pumps increased? A. In leasing?

Q. Both ways, sales, leasing, and every way; that is, there are more— A. (Interrupting.) I think there are a great deal more sold, that is, the sales have increased greatly.

Q. Your company is selling to refiners and jobbers, isn't it? A. I do not know what they are doing.

Q. You do not know? A. No, sir.

Q. When parties here have testified that they
450 bought Bowser pumps for the purpose of leasing and reselling, the Bowser Company was the recipient of the benefit of that sale, wasn't it? A. Yes, sir; if they sold them under those conditions; yes, sir.

Q. And the only party in that instance that was injured is yourself losing your commission; isn't that right? A. No, there are others, you know, that depend upon my order.

Q. Yes, but if the Bowser Company sold its share of these pumps that have been leased and loaned and resold by refiners and jobbers, then they have not been injured, have they? A. That ain't for me to

451

decide, whether they have been injured; I don't know anything about their business.

Q. I am asking if it is not a fact, if they had their share of the output in, whether there is leasing or loaning or not, then they have not been injured—the company, have they? A. I think they would as their business would not be enhanced by the leasing of those pumps that they would have sold otherwise.

Q. So their business would not be injured, would it, if they have sold them from the factory? A. I don't know whether their business would be injured or not; I am not in a position to know that.

452

Q. Now, supposing there had been no leasing or loaning of these tanks by refiners and jobbers; and the Bowser Pump Company had sold through you and other agents 5,000 pumps and tanks in a year. Now, if they have sold 5,000 tanks through their agents and through the jobbers and refiners, they have not been injured, have they, if they have sold 5,000 in each instance? A. I could not answer that; I don't know anything about that, sir.

Q. Wouldn't the Bowser Company make as much profit perhaps upon 5,000 sold through the agents as they would upon the 5,000 sold through agents, jobbers and refiners? A. I could not answer that.

453

Q. Do you undertake to say that they would not? A. That I don't know.

Q. You don't know? A. No.

Q. Would you say that they had not made as much? A. I couldn't answer that.

Q. You couldn't answer the question? A. No.

Q. Now, assuming that they have made the same amount of profit upon the 5,000 tanks that was sold through agents, jobbers and refiners that they would have made if it had all been sold through their agents; they are not injured, are they? A. I couldn't tell you.

454 *John S. Sheean, Cross*

Q. You could not tell me? A. I could not. I could not answer that at all.

Q. Then if they have made the same amount of money, the only one that is injured is yourself, isn't it? A. I don't know anything at all about the company's profits; I do not know what they are doing over there.

Q. (Question read.) A. I don't know whether they are injured or not; I am not here to answer that.

Q. Assuming that they have made the same amount of profit, then the only party that has been injured
455 is yourself? A. No, sir.

Q. Who else? A. Every man connected with the employment of the Bowser Company.

Q. Every man? A. I should think so.

Q. Every man in the employ of Bowser Company would have had just as much work and would have received the same employment, wouldn't he, in making 5,000 tanks, no matter how they were sold? A. That part of it is beyond me; I don't know nothing about that part of it.

Q. Wouldn't it take just as many men to turn out 5,000 pumps, whether they were sold one way or the other? A. It is according to the disposition of the
456 men, maybe.

Q. The disposition of the men? A. Yes, sir.

Q. Who have you ever made a complaint to about this practice? A. I might have made a complaint to some of the oil companies—might have made a little kick in regard to troubles I was having.

Q. You say you did? A. Possibly I did. I know I did to one.

Q. Who was that? A. Mr. Swango, of the Indian Refinery.

Q. Have you made any complaint to anybody since that date? A. I don't think there was any necessity at all. I got very little satisfaction from him.

Q. Have you made any report to the Federal Trade Commission? A. I didn't know there was such a commission existed until the other day.

Q. You are not informed on the machinery of the government? A. Some of it.

Q. Have you ever filled out any blank report for the government on the sales of pumps? A. No, sir.

Q. Never have? A. No, sir.

CROSS-EXAMINATION by Judge Chamberlin:

Q. Mr. Sheean, did you ever call on the Moore 458
Oil Company to sell pumps and tanks in Cincinnati? A. Why, I called, I think, I guess twenty-five or thirty times.

Q. Did you sell them? A. Yes, sir; I sold them through the inquiries that I got from them.

Q. Inquiries that you got from whom? A. Moore Oil Company.

Q. What was the nature of those inquiries? A. One I sold to a man on Western Avenue, and one I sold to a man on Fourth Street in Newport, Kentucky.

Q. Do you know whether the Moore Oil Company bought their-- A. (Interrupting.) I sold that direct. 459

Q. You sold that direct? A. I got the inquiries from them, and I went over there and closed the matter up.

Q. That is, the customers of the Moore Oil Company? A. Yes, sir.

Q. Did you ever sell the Moore Oil Company? A. I don't know what I did—I don't know but what I did sell them one outfit for their own use. I don't remember whether I did or not. I may have sold them one outfit.

Q. Did you ever sell the Indian Refining Company? A. No, sir.

Q. Did you ever call on them? A. Just once.

Q. Just once; what was the reason you did not call on them further? A. Well, that was the man Swango that I spoke of a few minutes ago.

Q. Did you have a disagreement with him? A. Yes, sir.

Q. That is the reason you did not call on him again? A. Maybe he was a little too big for me; I don't know.

Q. Didn't you consider it your business to call on the refiners and jobbers to sell them goods? A. It
461 looked like if you did you would be tipping off your hand and they would go and get them before you.

Q. They would buy other equipment? A. They would put some other salesman wise to it, and by the time you got back there, it was gone.

Q. I thought you said you had a contract that protected you in this territory? A. I am not talking about Bowser. There are about nine or ten other salesmen that come around there in front of you, or behind you.

Q. You could not compete with them? A. Oh, I could compete with them all right, but the other fellow come around and there was no one to bother him.

462 Q. The reason you called on the Moore Oil Company twenty-five or thirty times was that they gave you these deals? A. Yes, sir.

Q. The Indian Refining did not give you these deals? A. No, sir.

Q. What was the reason you could not meet in competition with the other oil companies? A. I didn't try to meet them in competition; I didn't bother about any competition.

Q. Did the Moore Oil Company or the Indian Refining Company furnish any of these pumps to their distributors on loans or leases for the purpose of dis-

tributing their products to your knowledge? A. Not any that I sold.

Q. Did you ever suggest to anyone in your territory that they could go to a refiner or jobber and secure a Bowser pump on terms of lease or loan? A. I didn't like that kind of business.

Q. Did you do it? A. No.

Q. You did not do it? A. Not to my knowledge did I do that, because it put me in mind of a man selling automobiles, he had to take in another one before he could make the sale of that one.

Q. You expected you would have to take in an old 464
pump? A. No, I had that twice on a job and I didn't like that.

Q. You wanted to sell the first time you went? A. Yes, sir.

Q. Did you ever have any conferences with other salesmen of the Bowser? A. I never bothered my head about what they were doing. I had troubles enough of my own. I always try to keep them from someone else.

Q. You were not always in trouble? A. A salesman usually has a whole lot of trouble. I wouldn't be this gray if it was not for that.

Q. That is not peculiar to Bowser & Company, is 465
it? A. I don't know nothing about the company.

Q. Mr. Sheean, did you notice any difference in the amount of your sales from and after the first of—well, when you first noticed the practice of leasing and loaning? A. I got out of the territory.

Q. What do you mean by that? A. I changed my territory; I took territory north of Hamilton County.

Q. Why did you do that? A. I would run into such competition, I figured.

Q. Did you find the same kind of competition in the territory north of Hamilton County? A. Some

parts of it possibly was. I worked out in the country mostly.

Q. And tried to sell private parties? A. Yes, sir; and garages, paint stores, groceries.

Q. When was that? A. Since the first of the year.

Q. The first of this year? A. Yes, sir.

Q. You worked in Hamilton County you say three or four years after you discovered that they were loaning and leasing? A. Well, I had to; I couldn't do any different.

Q. How did your sales compare year by year dur-
467 ing those three or four years that you worked under those conditions? A. I was looking over—anticipating every month that I would have a blue ticket in the envelope.

Q. You are not answering my question. A. They fell off.

Q. You sold less and less, did you? A. Yes, sir.

Q. Can you state about what the ratio of decrease was? A. Well, I suppose about 33 1/3 per cent.

Q. Now, why do you say you suppose that; are you speaking as a guess or from your records? A. Well, I do not recall just exactly how much business I done prior to that, but I knew my commissions were
468 much less.

Q. That would be in the year 1916, wouldn't it, three years ago? A. Yes, sir; 1916, 1917 and 1918.

Q. Now, how were your commissions in 1917 compared with 1916? A. They were about the same.

Q. Fell off 33 1/3 per cent again? A. No, just about equal.

Mr. Taber: About the same each year?

Q. About the same percentage fell off?

Mr. Taber: No, the same sales.

469

Q. The sales were about the same in 1917 as they were in 1916? A. Yes.

Q. Then you didn't lose anything in 1917? A. No, but I lost in 1915 and 1916, around that; I don't know whether it was that year or not; around about that time.

Q. You said in your direct-examination three or four years ago. A. Yes, sir.

Q. Now, in 1918, how did they compare with 1917? A. About the same.

Q. What do you mean by that? The commissions were about the same in 1918 as they were in 1917; 470
is that what you mean? A. Yes.

Q. So that you only lost 33 1/3 per cent of the sales of 1915? A. Yes, sir.

Q. How did the sales compare in 1915 with 1914? A. I think I done better in 1915 than I did in 1914.

Q. How much? 33 1/3 per cent? A. Oh, no.

Q. How much? A. It might have run about 15 per cent.

Q. Then your sales in 1917 and 1918 were about ten per cent less than your sales in 1914? A. No, they were about one-third, I guess.

Q. They were about one-third what they were in 1914? I do not follow your arithmetic, Mr. Sheean. 471
A. I told you I gained between 1914 and 1915, or 1915 and 1916, about ten per cent, didn't I?

Q. I don't think you said that.

(Record read.)

A. I said that the sales between 1915 and 1916 —I had a gain of about ten or fifteen per cent, and a loss in the next three years that equalized through the year. I didn't say each year 33 1/3 per cent, but they fell off about one-third.

Q. You say the first of this year you changed your territory, the first of 1919? A. Yes.

472 *John S. Sheean, Cross*

Q. How did your commissions compare during 1919 with 1918? A. I guess I made as much money from the first of the year up until July as I made all last year.

Q. Was that by reason of your calling on more customers, having a larger territory? A. No, it was for the reason that the method of handling the business was not as keen up there in that territory as it was in Hamilton County.

Q. Competition not as keen; you had new customers? A. A different class of customers to call on,
473 too.

Q. Would you refuse to sell a jobber or a refiner pumps and tanks if you knew he was going to loan them? A. How?

Q. Would you refuse to sell in your territory a jobber or refiner if you knew he was going to loan those pumps? A. I would sell him anything. It wouldn't make any difference to me. In the first place I would not ask him what he was going to do with them, and I would not want him to tell me what he was.

Q. If he did tell you, you would not refuse to do it? A. No, sir, if he told me he was going to re-
474 sell, I would have to refuse him.

Q. Would you refuse a jobber or a dealer— A. (Interrupting.) According to my contract.

Q. That is, your contract restricts you to sell to users of the tanks? A. That is, those who are going to resell them—

Q. (Interposing.) You are not permitted under your contract to sell? A. In other words, I could not hire an agent.

Q. Let me understand you clearly; could you sell to a jobber if you knew he was going to resell those pumps? A. No, sir.

475

Q. You are restricted by the terms of your contract? A. Yes, sir.

Q. Under the terms of your contract would you get any credit for sales that arose in your territory, or, in other words, that come from your territory? A. How?

Q. Would you get any credit or commission for sales that arose in your territory not through your solicitation or your writing the order? A. If a man —in other words, if you would write into the house and ask them to ship you a tank and pump.

476

Q. Yes. A. I would be credited with the commission.

Q. But in case a jobber did that, you would get no credit? A. I would get credit for anything that was sold in my territory.

Q. If the jobber bought and sold in your territory— A. (Interrupting.) There would not be any jobber because Bowser & Company have no jobbers.

Q. They sell to those who resell, do they not? A. How?

Q. Don't they sell their pumps and tanks to those that resell? A. In my territory my contract says I am the sole salesman in that territory; any pump sold coming into my territory I get the commission on.

477

Q. And the Bowser Company refuses to sell to the jobber in your territory? A. Before they would sell to a man who would inquire for an outfit they would send that inquiry to me, and then I would go and see that party.

Q. Now, let us get it a little more concretely; supposing that the Brown Oil Company or some other oil company located at Hamilton—that is in your territory, is it not? A. Yes, sir.

Q. (Continuing.) Should write into the house and ask if it could place an order with them for five tanks? A. Yes, sir.

Q. Well, now, would you go to that Brown Oil Company and endeavor to secure an order from them for those five tanks? A Yes, sir.

Q. Would you do that if you knew that they were going to sell those tanks again to some distributor? A. According to my contract I am not allowed to sell anyone anything, any tank or pump, who would resell it.

479 Q. Mr. Sheean, do you sell on commission? A. Yes, sir.

Q. Entirely on commission? A. Yes, sir.

Q. Pay your own expenses? A. Yes, sir.

Q. What do these outfits sell at? I suppose there are different prices for different kinds? A. Yes.

Q. But I mean the regular five-gallon outfit? A. I would have to have my price book here to give you the price of it. I never made it a practice to try to memorize prices. I made a mistake one time and it cost me about $50.00.

Q. You sell at the regular printed list prices? A. Yes, sir.

480 Q. What commission do you get? A. It varies.

Q. How does it vary? A. According to the outfit you sell.

Q. Take this five-gallon pump, what commission do you get on it? A. Some—I couldn't very well tell you just exactly what commission, but they range about sixteen or eighteen per cent up to about thirty-three.

Q. Thirty-three per cent? A. But that—there is about twenty-five different outfits in there, you know, and I couldn't tell you just exactly. If I had my price book, I could give you the whole information, just like I do to a customer.

Q. As a salesman you are tolerably familiar with the articles that you sell, are you not? A. Yes, sir.

Q. Do you have in mind this five-gallon pump and tank that is used by the garages generally? A. Yes, sir.

Q. Now, with reference to that what do you get? A. I can't tell just exactly. I was just trying to think of the amount that I get on a certain amount sold.

Q. Just as near as can be; is it ten or fifteen or twenty? A. It will run about twenty-two per cent on those five-gallon pumps. 482

Q. About twenty-two per cent. Now, if you were to sell those in wholesale lots to a dealer, would you get a different per cent; for instance, if you sold a lot of ten pumps? A. We would give the trade discount then.

Q. Would that trade discount come out of your commission? A. Part of it.

Q. Part of it; so there would be a difference between the percentage of profit that you would get in selling to a wholesale dealer or to the consumer? A. If you would be selling ten outfits, where it would take three weeks to sell one outfit to some other individual. 483

Q. Would you favor the Commission, the Federal Trade Commission, in issuing a cease and desist order; would you be in favor of having the Commission issuing a cease and desist order from loaning or leasing these pumps? A. Well, for my own individual benefit, see? It would be hard for me not to. It would be better for me if they never put them out that way at all.

Q. So you would be in favor of it? A. Yes, sir.

Q. And against these oil companies; even if that restricted the number of pumps that would be re-

quired to serve the public? A. I do not think it would restrict it.

Q. Upon what basis do you say that? A. I think there would be just as many and possibly more, because a salesman would have a better advantage to go around and get that many more stockholders. He could work that much harder. It is an awful incentive for a man to work you know, if a man has an order in his pocket.

Q. It is an awful incentive for him to go to work and get another one? A. He will go after the sec-
485 ond one better if he had one started.

Q. In your opinion would a cease and desist order which forbade the refiners and jobbers from buying for the purpose of leasing and loaning Bowser pumps have a bad effect upon your company, upon the Bowser Company? A. I don't know.

Q. In other words, you do not know much of anything about any of these conditions except as they figure up in commissions? A. To me, yes, sir.

Q. Did you ever have any experience in soliciting orders where you found that the credit of the party was not such as the house would recommend—or rather would not recognize sufficient to consummate
486 the sale? A. I never bother with that. They tend to that over there for us. They won't ship them if it is not good.

Q. Where you have solicited the sale of Bowser pumps and the order was refused on account of the credit of the party, have you ever known of pumps being secured by those parties and put into operation? A. No, I never have.

Q. You never have? A. No.

487

CROSS-EXAMINATION by Mr. Myers:

Q. Mr. Sheean, suppose that instead of the oil companies leasing and loaning these pump outfits, they would make these different retailers their agents and install a pump in there and have them sell the gasoline as agents of the oil companies, would that make any difference in your business as under the present conditions? A. I don't know.

Q. What do you think about it? A. I don't know what effect that would have; I cannot answer that.

488

Q. You cannot answer that question? A. No, sir.

Q. Now, as a matter of fact, Mr. Sheean, if these people who are now loaning or leasing pumps from oil companies were the agents of these oil companies, you could not sell them the pump, could you, if they had a pump already as an agent of an oil company? A. I do not know whether I could or not.

Q. What would be the reason for their buying a pump of you when they already had one installed as an agent?

489

Mr. Zechiel: What would be the reason for their buying a pump? I do not want to be technical about this proceeding at all, because it ought to be open and free. I think the witness has admitted himself ignorant along that line, and I believe it is forcing the witness into a line about which he knows nothing, unnecessarily so.

Mr. Myers: That is a fact here that ought to be admitted. It is a self-evident fact.

Mr. Zechiel: If that is so, if it is a self-evident fact, then it ought not to be gone into.

490 Mr. Myers: Are you willing to put that in the record as a stipulation, that the fact of an agency would not materially change the condition as it already exists in regard to the sale of pumps?

Mr. Zechiel: Why should you insist upon the stipulation of a self-evident fact? I do not think it is self-evident, but you do, and that is all there is to it.

Mr. Myers: Let us have then what this witness says.

Mr. Zechiel: This witness admits he is ignorant on that line. He would not and
491 he has not answered questions that would show himself qualified. He has not been examined on that line.

Mr. Myers: We are not limited by that.

Mr. Zechiel: I think the effect of this is to examine this witness on a line on which he is not qualified and on a line which is not relevant to the investigation.

Mr. Myers: This witness qualifies himself as a pump salesman as being familiar with conditions in that territory for the last seven or eight years, with regard to conditions in his territory.

492 Mr. Zechiel: Is there any evidence that he is familiar with that kind of a situation?

Mr. Myers: Probably not, but he can say so.

Mr. Zechiel: There is no evidence of that kind; so far there is no evidence of that kind.

Examiner McCorkle: Permit the gentleman to ask the question. You have the right to question his knowledge and his ability, and so forth. That goes to the question of his qualifications. Of course, gentlemen, we want to shorten his testimony as much as possible. You may proceed.

(Question read.)

The Witness: That reason ought to be self-evident enough to him without asking the question.

Mr. Zechiel: Just answer the question, if you know.

The Witness: Because the pump is already there. What does he want another one for?

Mr. Zechiel: Just a minute; Mr. Examiner, let us have the witness's answer to the question, not his argument with counsel.

Examiner McCorkle: Answer the question, Mr. Sheean, as well as you can without asking the counsel a question. 494

The Witness: I cannot tell what is in the minds of the man who is doing that business, whether he wants to buy a pump or whether he does not want to buy a pump until I get on the ground to try to sell him one.

Q. Then if he has already a pump, he does not want to buy one, does he? A. Not from me.

Q. Then the proposition rests upon the same basis as it is today, if a man already has a pump, it don't make any difference whether he is an agent or whether he has one leased? A. I don't know anything about that part of it.

Q. What do you think about it? (No reply.) 495

Q. Answer my question. What do you think about it?

Mr. Zechiel: Mr. Examiner, I insist that the witness has answered the question.

Examiner McCorkle: I guess he has answered. He says he does not know anything about it. That is a pretty good answer, a pretty full answer.

Q. You said a while ago that the fact of leasing and loaning of oil pumps was demoralizing to the salesman, didn't you? A. Yes, sir.

Q. Wouldn't it be demoralizing to a salesman if the customer had already a pump as an agent of an oil company? A. I never call on a man who has already got a pump. I am calling on the man who has not got a pump.

Q. Take the man who has not got a pump and you call on him, and he finds out that he can get a pump by becoming an agent of an oil company, would that make any difference as to whether you would be able to sell him? A. I would try to sell the man; if I could not sell him, I would go away.

497 Q. The fact is, you could not sell him if he could get a pump for nothing, could you? A. A man would be foolish; the whole world over, we are all grabbing for something for nothing.

CROSS-EXAMINATION by Mr. Holliday:

Q. Did I understand you to say that there were no pumps in Cincinnati? A. I don't know anything about that; I couldn't answer you that.

Q. You would not say that there were not? A. I don't know a thing about it.

Q. Were you the representative of the Bowser
498 Company in Cincinnati in the years 1913, '14 and '15? A. Yes, sir.

Q. And you were agent for the Bowser Company up to the first of this year in Cincinnati? A. Yes, sir.

Q. And yet you say that you do not know whether any Bowser pumps were leased during that time in Cincinnati? A. There might be.

Q. Don't you know, as a matter of fact, that the first twelve outfits that were leased in Cincinnati were Bowser outfits? A. I don't know it, sir.

Q. You would not say that that was not true? A.

No, I would not say it was not true; I say, I don't know it.

Q. Was there anybody else representing the Bowser Company in Cincinnati during that time? A. Yes, sir.

Q. Who was it? A. There was Mr. Stearn, Mr. Woods and Mr. Mann; I think Mr. Mann had charge of the office there at one time. I worked under him. Then Mr. Woods came there after Mr. Mann, I think, and Mr. Mann and Mr—Mr. Wood, and then Mr. Stearns, H. S. Stearns.

Q. As a matter of fact, hasn't it been your custom 500
in endeavoring to sell Bowser pumps to go and pick out what you think is a good location for a pump, and then go and get an oil company to lease that man a pump and buy the pump from you? A. I never made that practice.

Q. You never have done that? A. No, sir

Q. Would you say that the agents of the Bowser Pump Company that you have known in that territory have not done that? A. They might have done it.

Q. Have you made representations to prospective purchasers of your pumps that if they would buy one of your pumps, they would get a good pump, and 501
then an oil company would come and buy it for them and lease it to them; has that been one of your sales policies? A. I don't know whether I ever made that statement in my life.

Q. Would you say that you did not? A. I would not say that I did not.

Q. As a matter of fact the oil companies in Cincinnati and Hamilton County and in your territory, the wholesale companies, have bought large quantities of Bowser pumps, have they not? A. I never sold them to them.

502 *John S. Sheean, Re-direct*

Q. Well, you do not mean to testify then that the Bowser Pump Company has not sold large quantities of pumps to the wholesalers of gasoline? A. I know Mr. Wood has sold to the Moore Oil Company, I suppose very nearly all their pumps that they use in their stations.

RE-DIRECT EXAMINATION by Mr. Zechiel:

Q. Mr. Sheean, at the time you tried to sell oil tanks and pumps to customers who would not buy,
503 do I understand that you testified on cross-examination that these prospective customers told you that their reason for not buying was that they could lease and loan from an oil company or somebody else engaged in the pump business? A. I have had two or three of them say that to me; I do not recall their names; it has been some time ago.

Q. Now, you testified on cross-examination that recently, in the last year, your business had increased in your territory in the sale of Bowser equipments? A. That is on account of moving from one territory to another.

Q. What was the difference between the competi-
504 tion in the two territories? A. Well, the competition was pretty keen in one of them, in the first one.

Q. What do you mean was keen; do you mean the competition between the lessees, those that sold pumps and yourself? A. The competition between the pump makers and conditions that existed there.

Q. By "conditions that existed" are you referring to leasing and loaning of pumps? A. Yes, sir, part of it.

Q. In the new field, what is the fact about competition there? A. I experienced but very little competition in regard to the—

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Q. (Interposing.) Do they lease and loan pumps in your new field? A. I haven't run across many of them; they were possibly leased and loaned before I got there and I knew nothing of it.

Q. But you are selling pumps in that territory? A. Yes, sir.

Q. With respect to the possible order of the Commission against oil companies to cease and desist leasing and loaning oil tanks and pumps, from your experience in the sale and distribution of these outfits, do you think that the oil business will be compelled to sell its product through the service stations, the big service stations owned by the companies, and that there will be a decrease in the sale of pumps and tanks to individual parties? A. I do not think there will.

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Mr. Holliday: I do not know that there are any rules of examination, but I submit that this gentleman has not qualified himself as an expert in the oil business.

Mr. Zechiel: I will withdraw the question.

Q. From your experience in the sale and distribution of oil tanks and pumps, will the possible effect of an order to cease and desist result in a decrease in the sale of oil tanks and pumps to garages and other vendors of gasoline products? A. I think it would help a whole lot.

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Q. Do you mean that the sales would be greater or less? A. They would be greater.

Q. If the Standard Oil Company of Ohio were leasing and loaning oil tanks and pumps manufactured by Gilbert and Barker Company of Springfield, Massachusetts, would you consider it good business to induce either the Standard Oil Company or independent companies to enter into the same kind of

competition and buy pumps from you? A. It is pretty hard for me to put myself in the position of somebody else.

Q. Let me amend the question—"where the competition is in the field where you are engaged in selling and distributing pump and tanks." A. It would be much better for me if there wasn't any pumps put into the market at all other than those that were sold by the manufacturers.

Q. The various manufacturers? A. The various manufacturers.

509 Q. But if there were pumps put on the market through the process of leasing and loaning, and those pumps were the pumps of a competitor, would you consider it good business for your company to enter into the same kind of business, of selling pumps to independent oil companies who would lease and loan? A. I could not answer that question.

J. E. SMITH was thereupon called as a witness, and being duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

510 Q. What is your name and address? A. J. E. Smith, Washington C. H., Ohio.

Q. What is your business, Mr. Smith? A. Oil business.

Q. Are you connected with an oil company? A. I have a company of my own.

Q. What is the name of your company? A. The J. E. Smith Oil Company.

Q. Where do you operate? A. In Washington Court House.

Q. Ohio? A. Ohio.

Q. Do you operate in that territory in and about Washington Court House also? A. I get out about sixteen or eighteen miles.

Q. In connection with your business, do you make a practice of selling or leasing and loaning your oil tanks and pumps? A. Of selling pumps.

Q. Do you lease or loan such pumps? A. No, sir.

Q. Have you ever lost any customers because you would not lease or loan such pumps? A. Well, I don't know. I have turned down some propositions, but that is about all I know about that. I might have got them if I had. 512

Q. Do you mean that requsests have been made of you to lease and loan— A. (Interrupting.) Yes, sir.

Q. Pumps, and you refused to do so? A. Yes, sir.

Q. Did those customers install pumps after that? A. Yes, sir.

Q. Were you ever able to sell them any gasoline? A. Oh, nothing of any amount. I have sold them a little stuff but not into their tank.

Q. Well, you sold very little gasoline to these particular parties? A. Yes, sir.

Q. Do you know whether these parties did secure an oil tank and pump outfit from a competing oil company under leased contracts? A. I do not. 513

Q. You don't know whether they did or not? A. I do not.

No cross-examination.

514 *T. C. Potts, Direct*

T. C. POTTS was thereupon called as a witness, and being duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. What is your address, Mr. Potts? A. Cleveland, Ohio, 1836 Euclid Avenue.

Q. What is your business? A. Sales representative, S. F. Bowser Company.

Q. As sales representative, do you have charge of a particular field or territory? A. Yes, sir.

Q. What is the territory allotted to you? A. The
515 Counties of Cuyahoga, Lake and Lorain.

Q. Generally, in and around what place? A. Cleveland.

Q. How long have you been connected with the Bowser Company? A. Twelve years.

Q. During that time have you always been salesman in some branch or other? A. Yes, sir.

Q. Over what territory has your employment extended? A. The territory I have just mentioned.

Q. You have always been in the Cleveland territory? A. Yes, sir.

Q. How do you conduct your sales business, generally, in your territory? A. By solicitation, largely.

516 Q. And what class of people do you solicit? A. All branches who are nominally interested in our equipment.

Q. No particular class—garages? A. Garages, factories, oil companies, dry cleaners, etc.

Q. Where you make sales of Bowser products how are such orders or sales filled? A. The orders are taken by us individually and forwarded to our home office and filled from that point.

Q. Where is your home office? A. Ft. Wayne, Indiana.

Q. And the pumps and tanks that you sell are

shipped from Ft. Wayne? A. Shipped from Ft. Wayne to the customer.

Q. Direct to the customer? A. Direct to the customer.

Q. In your experience in connection have you ever solicited or tried to sell to oil dealers, retailers or other parties who have refused to buy, stating as their reason that they were able to secure such equipments by lease or loan from competitors or oil companies who handle gasoline pumps and equipments? A. I have.

Q. How many such instances do you recall in a 518
general way? A. Oh, I should say a great number.

Q. It has been a difficulty that you have met in your experience in selling your tanks and pumps? A. Yes, sir, it has been.

Q. Has that been true generally throughout the territory over which you have jurisdiction? A. It has.

Q. What is the relative, either increase or decrease, in the sale of gasoline pumps during the periods from 1912 and 1913 on down to date? A. I don't just understand your question.

Q. Read it please. 519

(Question read.)

A. I think we can show a corresponding increase each year in our territory.

Q. That is, you mean to say each year from 1912? A. Yes, sir.

Q. Down to the present, you have had a gradual increase in the sales? A. Yes, sir.

Q. Of oil tanks and pumps? A. Yes, sir.

Q. Now, if you were to divide that business generally and speak with reference to sales to garage

men and other retailers of gasoline, what would be your answer? A. You mean to qualify it with reference to what we have sold to oil companies and what we have sold to—

Q. (Interrupting.) Yes, I mean to classify it with respect to this, the oil trade and the dry cleaners' trade; put those in one group and then the garage business or retailers of gasoline business in one group, and speaking with respect to the latter group, what would you say as to the per cent of increase or decrease in the sales since 1912? A. Well, I should
521 say that the percentage of sales to oil companies has been larger with each succeeding year since 1912.

Q. Let the answer stand if there is no objection, but it is not the thing I wanted you to answer—with respect to the garage business, retailers of gasoline, not wholesalers of gasoline, but with respect to retailers of gasoline; what is the situation? A. I would say that that has probably shown a gradual decrease particularly during the past five years.

Q. During the past five years? A. Yes, sir.

Q. How much of a decrease in actual number of sales has there been from that period of, say 1914, down to the present time? A. I wouldn't know how
522 to arrive at an intelligent answer to that question without my records before me.

Q. Let me just ask one more question along that line. Will you say that you are now selling half as many oil pumps and tanks to retailers of gasoline as you did in 1914? A. I think we are, yes, sir.

Q. Are you selling more than half as many? A. I would say that that was a fair estimate.

Q. Are these sales made as replacement sales or as new sales? A. Both.

Q. How are they divided, if you can make a fair estimate? A. Well, I should say seventy-five per

cent are new sales and the balance are replacements.

Q. About what per cent of the retailers of gasoline in your territory own their own equipments, if you know? A. Probably fifty per cent.

Q. What has been your experience with the remaining per cent; that sales could have been made —this is in your judgment—that sales could have been made to the remaining per cent if there had been no lease or loan of oil tanks and pumps by oil companies? A. It could have been made to some of them.

Q. About what per cent do you think sales could 524
have been made in your experience, I mean what per cent of the fifty per cent? A. Well, personally, I should say fifty per cent of the fifty per cent.

Q. If you know, of the remaining twenty-five per cent have such installations been permanent or have they been installations which have lasted a short time and then been removed? A. They haven't been permanent. That has been my observation, largely.

Q. Would you say that that is true largely of the remaining twenty-five per cent? A. Quite so.

CROSS-EXAMINATION by Mr. Myers:

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Q. Mr. Potts, you say that fifty per cent of the people in your territory own their own pumps? A. I would say that number would be a fair estimate.

Q. And that if the oil companies hadn't loaned or leased, twenty-five per cent of those people would have purchased pumps from you or some other pump salesman? A. That is my opinion.

Q. Then the other twenty-five per cent of the pumps that have been sold in your territory would not have been sold at all? A. Well, I don't know as to that.

526 *J. O. McCracken, Direct*

Q. Isn't that a fair deduction from your testimony, that if fifty per cent did own them and you could have sold, or some other pump representative could have sold twenty-five per cent, then the twenty-five per cent remaining could not have been sold to anybody; they would not have been sold unless they had been leased or loaned, isn't that what you mean by your testimony? A. I think a market was created perhaps for this other twenty-five per cent that we could not create a sale for.

527 Q. As a matter of fact the pump companies, the manufacturers of pumps, have benefited by the oil companies loaning and leasing these pumps? A. In my opinion they have, yes, sir.

J. O. McCRACKEN was thereupon called as a witness, being duly sworn, testified as follows:

Direct-examination, by Mr. Zechiel:

Q. You may state your name and your address? A. J. O. McCracken, 128 East Gay Street, Columbus, Ohio.

528 Q. With what company are you engaged? A. S. F. Bowser & Company, Ft. Wayne, Indiana.

Q. How long have you been employed by that company? A. About thirteen years.

Q. During that time you have been employed in what territory? A. Well, I was in Philadelphia about five years.

Q. How much of that time have you spent in the State of Ohio? A. About six and a half years; it will be seven years in January.

Q. In what part of Ohio have you spent those six and a half years? A. Just around Columbus.

Q. What is your general method of doing business for the Bowser concern? A. Well, we sell to all the different lines, dry cleaning, garage, oil companies, part of them, to the paint man and factory.

Q. During your experience with the S. F. Bowser Company in the sale and distribution of oil tanks and pumps have you ever solicited prospective customers who refused to buy your equipments because competitors of oil companies leased or loaned such equipments? A. I have, yes, sir.

Q. Has that been your—has that experience been common to your experience as a salesman with the 530
Bowser Company? A. Quite a number.

Q. What is the territorial extent of your employment? A. I virtually have seven counties outside of Franklin County.

Q. In and about Columbus? A. Yes, sir, all right around Columbus, all surrounding Columbus.

Q. Has this experience been uniform throughout that territory? A. Well, yes, you might say it has. Some parts of course are not so much so as others.

Q. In your experience what has been the fact about the sale and distribution of pumps and equipments from your company as to the relative increase or decrease in such sales from 1912, we will say, down 531
to the present time? A. Well, take 1913, because in 1912 I wasn't with the company.

Q. 1913. A. My business has increased every year since that.

Q. Would you be willing to make an estimate, or could you make an estimate as to the approximate per cent of increase in your business? A. 1914 was lightest, I think, caused by the war breaking out. I imagine so. But since then my business has been increasing. It has increased some each year.

532 *J. O. McCracken, Direct*

Q. Could you fix the approximate percentage? A. Oh, I guess probably a thousand dollars a year.

Q. On how much business? A. Is it necessary for me to tell how much it is? I prefer not.

Q. I don't care whether you put it in money. I thought you would limit it to percentage if you can fix the approximate percentage. A. It is a ten per cent increase.

Q. A gradual increase? A. A gradual increase since 1914.

Q. A gradual increase of 10 per cent each year
533 over the preceding year; now confining yourself to the sale and distribution of oil pumps and tanks to garage men and other retailers of gasoline, what would your answer be with respect to the percentage of increase or decrease since 1914? A. Well, the garage business has not increased as much as some other lines, I think from the fact that after we sell a garage once, why there isn't very much chance to sell him again on account of the equipment lasting, comparatively speaking, a lifetime, and there are not as many garages being built now as there were, I don't think—in comparison—as there were four or five years ago.

Q. Do you think that your per cent has increased
534 or decreased? A. I think my per cent has increased to a certain extent.

Q. So that today you are selling as many people who retail gasoline, or more people today who retail gasoline, than you did in 1914 and 1915? A. Well, very nearly as many; I don't see much difference.

Q. Now, have those sales been new sales or replacements? A. Well, mostly new sales. The only replacements we have are where a person who has a gallon pump—that is, as a general thing—wants a larger equipment, a five-gallon pump, or a two-gallon pump. We sell a great many larger pumps where five years ago we didn't make five gallon.

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Q. Considering that as a sale instead of a replacement, about what per cent are new sales and what—A. (Interrupting.) Do you consider that replacement a new business?

Q. I say, considering that as a new sale, what per cent then would you say are new sales, of this garage and other retail business? A. You mean just the garage?

Q. Yes, garage and other retail business. A. I don't know how to answer that because the most of the sales to the garages would be replacements, you know—the older garages.

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Q. Are you referring to changing a small pump to a large one? A. I am referring to changing a small pump to a large one, or a small tank to a large one.

Q. Considering that as new sales rather than replacements. A. That is the majority of our business—that and the new sales would be the greater majority of our business. Do I understand you right? That would be most of our business—the resales and the new business.

Q. About how many pumps and tanks do you sell to garages and other retailers of gasoline in your territory per year? A. That is pretty hard to answer. I think my sales—

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Q. By sales, I am including now the replacement by larger pumps for smaller. A. I cannot hardly tell you. I go by number, of course. My sales are all numbered but if I sell a ten-foot hose it has a number the same as a ten-barrel outfit and it would be very hard, without going over my books. I could tell that way; I could give you an estimate.

Q. Could you make an estimate that you think would be a fair estimate as to the number of sales of oil tanks and pumps per year? A. I would hate to say. Of course I hadn't figured that out at all. My

sales—my number of sales were I think in the neighborhood of 300, 250 to 300. That is numbers, but lots of those numbers are only for a ten-foot length of hose and maybe a nozzle. I presume out of that a hundred pumps.

Q. Equipments? A. Yes, sir, a hundred. That may be off but I am giving it as near as I can, to be honest about it.

Q. In your experience, about what per cent of the pump equipments used by retailers of gasoline are privately owned and what per cent are leased or
539 loaned? A. You mean in my entire territory?

Q. Yes, in your territory. A. Of course, you will find, I think, in the country more of them own their own equipment than they do in the larger cities. Of course, I think the majority of garages and also the stores through the country own their own equipment, but, of course, in the city, a few years ago, there used to be quite a number that were leased out, but now I don't think there is very many of them in Columbus.

Q. You mean that are leased and loaned? A. I don't think there is very many. I think a great many of them have been dug up.

Q. So that it would be your best judgment that the
540 greater per cent of pumps and tanks in your territory are now privately owned? A. I would imagine so, at least 60 per cent.

CROSS-EXAMINATION by Mr. Lippincott:

Q. How many salesmen have the Bowser Company, if you know? A. About 450.

Q. Do they frequently get together at the home office, or in groups? A. About once a year.

Q. Have you attended those meetings? A. We have had no—we have a club called the Pacemakers

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that all who are founate enough to get into that have a convention once a year, but we haven't had those conventions for three years on account of the war.

Q. Now, do you meet frequently these salesmen and have a talk with them? A. Why, not very often. When I go into the factory, and I go in four or five times a year, there are always a few salesmen there.

Q. As you go to the factory do you keep in touch, to some extent at least, with the increase or decrease of the business in general? A. I do.

Q. Can you give us some idea as to whether Bowser & Company are increasing their volume of sales or de- 542
creasing them? I don't ask you for figures unless you want to give them. A. I am not going to give the amount of business. I know, but I am not going to give it. That is, I don't think it is necessary, but the increase in the business in 1918 over 1917 I think was about a million dollars.

Q. In 1917 did they have an increase over 1916? A. I think they increase every year.

Q. Every year? A. They aim so.

Q. Now, as you meet the salesman from time to time whether at the home office or other places, are sales increasing, do you know? A. Salesmen are salesmen. They always say they do whether they do 543
or not. Of course, this year you know our sales won't be anything like they were last year.

Q. That is on account of your strike? A. Yes, that is on account of our strike.

Q. It lasted from last February until about this time? A. Lasted from May to September.

CROSS-EXAMINATION by Mr. Myers:

Q. You do business around Springfield, don't you? A. No, that is out of my territory.

Q. What territory have you? A. Do you want me to give you the counties?

Q. Yes. A. I have Marion, Morrow, Madison, Union, and I had, up to the 15th of September, Fayette and Fairfield, but now they have been taken to another man and I have Madison and Licking and Franklin.

Q. Now, your experience has been in these counties that the leasing of oil tanks and pumps—that is, that the companies here are not doing that as much as they were before? A. Well, I don't pay very much atten-
545 tion to that. I don't think they are—I haven't come in contact with them much. They haven't bothered me any.

Q. Did you ever come in contact with any of the companies that were appointing agents—selling their gasoline that way? A. I don't know how you mean just exactly.

Q. Well, that is a grocery, for instance, instead of having a pump leased or loaned, he became an agent of some oil company and sold that oil or gasoline on a commission rather than on a— A. No, I have never come in contact with any that way.

546 *CROSS-EXAMINATION by Mr. Westfall:*

Q. Have you sold pumps to oil companies, Mr. McCracken? A. Yes, sir.

Q. You are not forbidden by the terms of your contract from selling to oil companies? A. No, sir, I sell to the oil companies. The oil companies have a contract where they sell a certain number of outfits the same as a private individual would have.

Q. When you make a sale of a pump to an oil company, do you include what disposition they are going to make of it? A. No, sir.

Q. How are they going to dispose of it? A. No, sir.

Q. It doesn't make any difference to you whether they lease or loan it or sell it, so long as you get paid for it? A. No, sir.

CROSS-EXAMINATION by Judge Chamberlin:

Q. Mr. McCracken, you stated in your direct-examination that you had failed to secure some sales where the parties had leased pumps, did you not? A. I don't 548
think so.

Q. Didn't you say that in your direct-examination? A. Did I? I don't think so.

Q. If you did say that, it was an error, was it? A. Now, wait until—I want to understand that thoroughly. I think I said that there were places where they have leased outfits but I don't—where a man has got a pump, I don't bother him. I don't go into details. That is not my business, but I don't think I have lost any sales. I don't think you will find that in my answers.

Q. It was my impression that you said that. A. I think somebody else did, but I didn't. I don't think I have lost any sales that way; I may have, but if a man 549
has got a pump I go and hunt somebody else.

Q. And the result is the same, whether he has leased it or bought it? A. If he has a pump my instructions are to say nothing to him. I hunt up a new prospect.

RE-DIRECT EXAMINATION by Mr. Zechiel:

Q. Would you consider it good business practice for you and the concern which you represent to sell pumps manufactured by your company to independent oil companies for redistribution by lease and loan,

550 *J. O. McCracken, Re-direct*

provided in the same territory, in the same competitive territory the Standard Oil Company of Ohio, for instance, were at that time and had been prior thereto engaged in leasing and loaning oil tanks and pumps of the Gilbert & Barker Manufacturing Company, of Springfield, Mass.?

Mr. Taber: I don't get the drift of that question.

(Question read.)

The Witness: I don't hardly know how to answer
551 that, but as far as the company is concerned, I don't know, but if I was selling to an oil company I would probably sell them six or eight, where I would probably sell one to an individual, and I would be perfectly satisfied if I was making the number of sales. I would would probably sell more to them, if I sold to an oil company, than I would if I sold to an individual, but I know nothing about what the company are standing on. Of course, I have never been consulted. I hope that is plain?

Q. And if there were in your competitive field pumps that were being manufactured by competing manufacturers and you could sell your pumps to an
552 independent oil company or some other oil company than that company handling your competitor's pumps, you would consider it good practice? A. I would sell my pumps, yes, sir, all I could.

Whereupon, at 5:00 o'clock P. M., an adjournment was taken until 10:00 A. M. Thursday, October 29, 1919.

OTHO F. MIKESELL was thereupon called as a witness, and being duly sworn, testified as follows:

Direct-examinaiton by Mr. Zechiel:

Q. What is your full name? A. Otho F. Mikesell.
Q. Where do you live? A. Lima, Ohio.

Mr. Zechiel: Do you want the street number, Mr. Examiner?

Examiner McCorkle: Yes.

The Witness: 116 North McDonald.

Q. With what concern are you associated? A. At 554
the present time?

Q. Yes, at the present time. A. Lily White Oil Company.

Q. How long have you been with that company? A. About 60 or 90 days.

Q. With what company were you associated prior to that time? A. The Carbonless Oil Company and the White Star Oil Company.

Q. With both of them, you mean? A. Yes, in my time, in business.

Q. I mean prior to your association with the present company, the Lily White Oil Company? A. With the Carbonless Company. 555

Q. What was your position with the Carbonless Company? A. I was manager, general manager.

Q. Is that the Carbonless Oil Company of Akron, Ohio, that is one of the respondents in this proceeding? A. No, Kenton.

Q. Your home is at Akron? A. No, Lima. I lived at Kenton when operating the Carbonless Oil Company.

Mr. Lippincott: I think you will remember that the Carbonless Oil Company is out of existence.

The Witness: I might state that the two companies have consolidated.

Q. What two companies are you speaking of? A. The Lily White and the Carbonless.

Q. Are you acquainted with the transaction, the consolidation of those two companies? A. Yes, sir.

Q. Just what was it? Did the Lily White Company buy the physical assets of the Carbonless Company, or the stock? A. Well, you would term that consolidating or buying, or it may have been just a combination of business, which is it?

557 Q. I am just wondering what did happen, that is all. A. Well, it is a combination of the two.

Q. In combining the two you mean you only have a trade agreement? Both corporations are still in existence, are they? A. No. Of course, the Carbonless Oil Company hasn't been dissolved yet; that is the intention; it should have been done by this time; it will be done soon.

Q. What relation does the Lily White bear to the Carbonless? A. Not any.

Q. At the present time? A. At the present time, only we are consolidated. I don't know that they would have any business relations with the Carbonless

558 Oil Company.

Q. Do they own the stock of the Carbonless Company? A. The Carbonless Company took in turn for the assets—

Q. In other words, what happened was that the Lily White Oil Company traded the stock of the Lily White Oil Company to you personally for your stock in the Carbonless Oil Company? A. Yes.

Q. I see; and that was true of the other stockholders? A. Yes.

Q. While you were associated with the Carbonless Oil Company as manager, were you acquainted with their general business methods? A. I was.

559

Q. What was the general business of the Carbonless Oil Company; what was it engaged in? A. Marketing petroleum products through the dealer mostly, and to the consumer.

Q. Over what territory? A. Hardin County and Logan County.

Q. In that connection did you also deal in oil tanks and pumps? A. I did.

Q. Did you sell your tanks and pumps to your customers? A. Well, a very few that we sold until this ruling came on.

Q. Did you lease or loan such oil tanks and pumps 560
for a nominal consideration under tying contracts or agreements to the effect that the customers were not to use, in connection with these pumps which you leased and loaned, or the tanks, any gasoline products of a competing company or any other company than yours? A. We didn't exactly lease. We simply placed the outfit on the man's place of business.

Q. But under substantially those conditions? A. No, not exactly. We didn't draw him down that close that we positively wouldn't allow anyone else to put in our tank, but rather an understanding that so long as we was able to supply him at all times when he was in need that we would want to do that, of course.

561

Q. There was an understanding then that he was to buy all the gasoline of you to be used in these oil tanks and pumps which you leased? A. No.

Q. I hadn't finished my question. A. Pardon me.

Q. All oil to be used through these pumps if you had the oil to sell him and were in position to do so? A. Yes.

Q. And the consideration which was paid you for the use of the oil tanks and pumps? A. Nothing.

Q. None at all? A. None.

Q. Where did you secure your pump equipments? A. Various companies. Shall I name them?

562 *Otho F. Mikesell, Cross*

Q. Yes. A. Milwaukee, Bowser, Wayne, Dayton Pump Company. That covers about the amount of companies.

Q. The Milwaukee Pump and Tank Works were located where? A. Milwaukee.

Q. Wisconsin? A. Wisconsin.

Q. To whom did you order your oil tanks and pumps sent when you ordered them from these fac tories? A. To our company.

Q. Did you at any time have an oil pump and tank, or either, sent to a customer? A. No, sir.

563 Q. When you ordered such an equipment, did you order it for a particular customer? A. No, not as a rule.

Q. Did you at any time? A. There was times, yes.

Q. And when oil tanks and pumps were shipped into the state to you, what disposition did you make of them? A. In delivering to where they were to be used?

Q. Well, I want to get the whole disposition from the time they were sent to you. A. Well, if we had them in our wareroom, why, of course we hauled them to where they were to be used. Sometimes we would haul them from the railroad station to the place

564 where they were to be installed.

Q. And that was the railroad station to which they were shipped to you from the factories outside of the state? A. Yes, sir.

CROSS-EXAMINATION by Mr. Lippincott:

Q. Did you ever do any business outside of the State of Ohio? A. No.

Q. Mr. Mikesell, did any of your customers who owned—I mean to say who were using your tanks and pumps, ever buy other kinds of gasoline or oil? A.

565

Occasionally when they would run out, when we were unable to supply them at that time.

Q. Did you ever take away from such a customer the equipment that you had loaned or leased to him? A. No.

Q. On account of that? A. No.

Q. Now, state, Mr. Mikesell, whether it is not a fact that all your customers have used other gasolines and oils than yours at various times? A. No, I wouldn't say that.

Q. You wouldn't say all of that? A. No.

Q. Let me separate it a little bit. Have all of them used other oils than yours? A. Yes, sir, oils. 566

Q. What percentage of them have used other gasolines than yours? A. Well, I would say possibly five per cent.

Q. How many stations did you have, filling stations, when the Carbonless Oil Company was in existence? A. Filling stations or curb pumps?

Q. Filling stations? A. One.

Q. How many curbstone pumps did you have when the Carbonless Oil Company was in existence? A. 22 or 23.

Q. I believe you stated in your direct-examination that the Carbonless Oil Company was out of existence? A. Yes. 567

Q. And is not expecting to or will not operate any more, is that it? A. No, not under the name of Carbonless Oil Company, no.

Q. Well, you have severed your connection with the Carbonless Oil Company? A. Yes, sir.

Q. So have all the other stockholders of the Carbonless Oil Company? A. Yes, sir.

Q. And by deed you have conveyed all of your assets to the Lily White Oil Company; is that right? A. Yes, sir.

RE-DIRECT EXAMINATION by Mr. Zechiel:

Q. Concerning the existence of the Carbonless Oil Company, you don't mean to testify that the Carbonless Oil Company, a corporation, is actually out of existence and been dissolved? A. No, it hasn't.

RE-CROSS EXAMINATION by Mr. Lippincott:

Q. By the last question you mean the dissolution has never been effected but it is out of existence? A.
569 So far as operation goes.

Q. That is what I mean, or intention to operate? A. Yes.

J. M. STOODT was thereupon called as a witness, and being first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. What is your name and address? A. J. M. Stoodt, 324 South Metcalf, Lima.

Q. Ohio? A. Lima, Ohio, yes, sir.

570 Q. With what concern are you affiliated? A. With the Lily White Oil Company.

Q. Is that the Lily White Oil Company that is one of the respondents in this proceeding? A. Yes, sir.

Q. What is your connection with that company? A. Secretary and chairman of the executive board.

Q. In your position as secretary and chairman of the executive board are you acquainted with the general business and the business policy of your company? A. I am.

Mr. Zechiel: I will say that there has never been an agreed statement of facts on the ques-

571

tion of the jurisdiction which is the reason for putting these witnesses on the stand.

Q. What is the general business that your company is engaged in? A. Marketing of petroleum products.

Q. What is the territorial extent of your business? A. Northwestern Ohio.

Q. In connection with your gasoline business, do you also sell oil tanks and pumps? A. We haven't done that to any great extent, especially since along in April or the first of May because we did not know exactly where we were at.

572

Mr. Zechiel: I wonder if you really got my question. Will you read it again?

(Question read.)

A. We do at times to prospective customers.

Q. In connection with your business do you also lease and loan oil pumps and tanks to customers? A. We have.

Q. Are you doing so now? A. We are not.

Q. When did you install your last pump under the loan or lease? A. Well, I think it was along in January or February; in fact, we haven't installed—

Q. (Interrupting.) Of this year? A. Of this year, 1919. 573

Q. About how many pumps did you sell in the last two or three years? A. Well, we haven't sold very many. I think we sold about three this year. In fact, we haven't made any effort to sell any.

Q. How many did you sell last year? A. I don't think there were any sold last year.

Q. About how many pumps have you leased and loaned under agreements? A. Something over a hundred.

Q. Are those pumps now outstanding, under this lease agreement? A. They are.

Q. What are the general terms of your lease agreement? A. That they use our oils, gasolines and greases, as much as they can get the goods.

Q. Insofar as you are able to supply them? A. Insofar as we are able to furnish them.

Q. Is there any consideration given for the use of these equipments? A. No.

Q. Where do you buy your oil pumps and tanks? A. We have bought from the Wayne, from the Bow-
575 ser, from the Rapid Dayton, from the Tokime.

Q. Is that the Tokime Oil, Tank and Pump Company, or the Tokime Manufacturing Company? A. The Tokime Oil and Tank Company.

Q. Located at Ft. Wayne, Indiana? A. Located at Ft. Wayne, Indiana.

Q. How do you secure your oil tanks and pumps? I mean by that, what is the general business transaction? A. We usually take it up with the local representative.

Q. Of the pump manufacturing company? A. Of the pump manufacturing company, and we agree to take a certain number of pumps, by that gaining a
576 certain discount, and buying those pumps they have them shipped into our storehouse and at any time we wish to use them we have a service man who is in position to take one of those pumps out and install it in case we have a place for it.

Q. Have you ever ordered an oil tank and pump shipped directly to a customer? A. Not under the leased equipment proposition.

Q. But you have where they are sold? A. We have had one there that was sold.

Q. Where they are leased you have them then shipped to your warehouse? A. Yes, sir.

Q. Where? At Lima, Ohio? A. Lima, Ohio.

Q. From there you distribute them to your various customers to whom you lease or loan? A. We have them there in stock; in case we have a prospective customer who wishes a pump, we usually take one out of the stock room that fits the case in which we expect to use it. If it is a small customer we use a small pump, if it is a larger one we use a larger pump.

CROSS-EXAMINATION by Mr. Lippincott:

Q. Mr. Stoodt, when you buy a pump, state whether 578
or not the contract is closed in Lima for the pump?
A. Always.

Q. Always closed in Lima? A. Always.

Q. Do you do any business outside of the State of Ohio? A. We do not.

Q. Now, when you install a pump for a prospective customer, you state that you do that without consideration. You mean to say he does not pay actual money for that pump? A. He does not.

Q. But isn't it a fact that the consideration moving from him to you for that installation is that you will try to furnish gasoline or oils, whatever it may be, to him when he needs it? A. That is the case, but we 579
have quite a number of cases where oftentimes they will buy other goods and put them in there and we have had several of those come up in the last few months, and in one case in particular where I went to investigate and asked them why they did that—they were the two customers of the town, being a small town—they stated that so much of their trade demanded the goods of one of our competitors that they had to use it, but on thorough investigation I found that the agent for this competing company is a very personal friend and has quite a friendship in this par-

580 ticular town and of course they like to favor him and whenever they can they try to split up the business, using our equipment to split up the business with the other firm.

Q. How many filling stations have you? A. Ten.

Q. How many curbstone pumps have you? A. I should judge we have something over one hundred.

Q. How do you serve these, what is the method of getting the product to the curbstone pump? A. By a truck from our various distributing points.

Q. Is it your truck? A. Our truck.

581 Q. Now, when your truck is not at the point of the customer when he wants a product, what does the customer do? A. Well, he could call up, which quite a few of them do, call us and we make the delivery.

Q. What do the others do? A. Some of them get some one else to fill them until we get there. We have had one case lately again where they told our man not to come but once a week. We have about, say an eighteen or twenty-mile drive, but once a week does not carry them, and our man comes there on Monday and usually on Saturday they fill from the other party and then our man comes there on Monday and the other party's gas carries it over the Saturday and

582 Sunday trade. We have offered to make two deliveries but they insist we make only one.

Q. State to the examiner whether or not you have a single customer who uses your products exclusively? A. I am safe in saying we have none.

Q. Have you ever compelled any of your customers to forfeit the equipment which you have placed for him because of that fact? A. We have not.

Q. When you enter into an agreement with this customer, state whether or not there is an implied understanding that all that is required of him is to favor you if he can conveniently? A. That is the object in

583

the business, to install the pump, to have them use our gas if it is at all possible for them to do so, and then we in that way can advertise our gas in that locality, and work on our trade and tell them where it can be had.

Q. Now, isn't there quite a saving for the public, for everybody, by having that system of delivery of gasoline and the various products of your company? A. Without a doubt, because we can establish 25 curb pumps a great many times where we can only establish one service station.

584 Q. I want to ask you about that. What is approximately the minimum cost of installing a service station, a filling station? A. We have them running from $2,000 to $40,000.

Q. The one at the corner of Market and Union in the City of Lima, whether the cost of that one, what was the cost of that one? A. It stands us $40,000.

Q. Take the $40,000 installation and tell the Examiner how many average curbstone pumps you can place with the $40,000. A. On an average of about 80 of the five gallon pumps.

585 Q. Now, Mr. Stoodt, if you would place 80 of the 5-gallon pumps over the territory instead of placing a $40,000 service station, you may tell the Examiner whether or not the public would be better served? A. It gives us 80 to 1 to serve.

Q. And the distance between pumps will be less, is that it? A. It will be cut down just that per cent.

Q. State whether or not, if you know, automobile drivers are frequently running out of gasoline and oil upon the road? A. I have had that experience just a week ago, myself.

Q. Mr. Stoodt, if a seize and desist order were issued and the curbstone pump man was compelled to handle that proposition on his own resources, what

would happen? A. Well, there are several things that would happen.

Q. Tell the Examiner? A. First it would be, if you would go to them and ask them to buy their equipment, a good many of them say that they don't care for gasoline business as it brings them only the extra patronage for other supplies in the automobile line, and the next is that a great many of them would not invest the money to buy that equipment and sell and bother with the gasoline trade. And then there are others again that don't want to be troubled with gaso-
587 line. They wouldn't invest the money, as I said before, and that lots of garages, for instance, say they don't want to buy equipment and send a dollar an hour mechanic out to take care of the gasoline trade, for, say $1.28 for 5 gallons when they make 5 or 10 cents; if they sell for 25 1/2 they wouldn't make more than 5 cents.

Q. Now, Mr. Stoodt, carrying that just a step further, supposing somebody, either your company or the curbstone pump man now has the equipment and a seize and desist order were to issue. What would happen to that equipment with reference to there being an economic loss to somebody? A. If we were
588 compelled to either sell them or take them out and we would go to our customer or dealer and tell him that, it would be perhaps like this man stated on the stand yesterday; about 70 per cent wouldn't know there was such an organization as the Federal Trade Board, and he would tell them that the Federal Trade Board ordered that, they would think it was something we were trying to bluff them through with, either to buy them or to buy one of their own, while others would understand it. But they would think they had us in a pocket and say, "We will give you

589

$25.00" for a $500.00 equipment. That would be what we had invested. The result would be we would be out on a hundred pumps if we had a hundred pumps out—we would be out, say $50,000 investment. That would be all right for a large company that could probably sell them for 20 per cent of their investment and charge the rest up to advertising or something like that and still get by. But for the smaller concerns it would naturally work a great hardship on their finances.

Q. Now, Mr. Stoodt, is the Lily White gas an exclusive preparation? A. The Lily White name is a 590
trade-mark and registered.

Q. Is the gas you use a particular kind of gas? A. It is.

Q. Made for you? A. Not for us, but it is a certain specification we ask for when we buy.

Q. Now, Mr. Stoodt, state if that is a blended gas? A. No.

Q. State what would happen if into a tank of Lily White gas other gases, blended gases, were placed as to the effect upon the customer, the ultimate consumer of the gas? A. It might be that someone would put something in that would not come up to the specifications that were used, and some of our 591
customers would use that at that particular time and would condemn our gas and say it wasn't up to the quality that we had been furnishing them before. It would be detrimental to our gas.

Q. Have you had that experience in your business? A. We have. I had one instance not long ago in a certain town where I went to solicit a man's business. He told me that he could not use it. I asked him why. He explained to me. So I told him it was very unreasonable. You know sometimes these garage men

592 *J. M. Stoodt, Cross*

are very handy on condemning something they are not handling themselves. You know a little adjustment on the carburetor can change the effect of gasoline very quickly. As it happened, by careful investigation, I found this was not our gasoline and he admitted it, but nevertheless it was not the fault of the gasoline, even if it wasn't ours, but these particular people were not handling our gas, but the gas of the other party, but the consumer naturally thought it was our gas.

593 Q. Mr. Stoodt, is there an adjustment of the carburetor that is adaptable to Lily White, a pure gas, and another adjustment for a blended gas? A. There usually is.

Q. So that the man who uses one kind of gas today and fills his car with it, or whatever he may have, and with another kind of gas next week, will not have the same uniform result on account of an adjustment needed; is that it? A. Exactly so.

594 Q. Now, Mr. Stoodt, if you know, state to the Examiner what would happen to the beginner who has no business but who has formed a company and wants to sell gasoline, if the seize and desist order were put into effect, now that the present system has been going on some years? A. Well, he would have an awful time breaking in because if he was going to market something that was unknown it would be very hard for him to break into new territory, especially where he would have to go up against known qualities and known goods, just like in any other line. It would be very hard for him to establish himself in this line of business because the garage men, if they are using a certain grade of gas—not only the gasoline, but oils—it is pretty hard to change them. We have one man who uses our gasoline through a leased pump, but positively says he will not use our

595

oils. We have solicited him. He says, "There is no use; I am using a certain oil; I have used it for years. He says, "My business and trade is established on it and I don't care to change."

Q. Mr. Stoodt, what would happen to the new man entering the gas or oil business, having in mind the fact that the older companies, have through the leased pump and equipment plan, now built up their business, formed their connections, made their friendship with the purchaser? A. It would be awfully hard for him to get started unless he would be allowed to do something to meet the competition.

596

Q. Mr. Stoodt, is there any way that you can think of of overcoming that difficulty, this system having now been in vogue some years? A. Well, it would be very hard to overcome it. It couldn't hardly be overcome now, because it would not only work a hardship on the new man but the smaller companies that are just getting under way have been compelled to go to this system through some years back, and it is hard to break away from it now.

Q. Now, Mr. Stoodt, would you mind, if you can from memory, stating the proposition of the pump man to you when you buy in quantities? A. I don't just understand the question.

597

Mr. Lippincott: Read it.

(Question read.)

A. Oh, it depends on the amount we buy to get a certain discount.

Q. Can you tell us what that is? A. Usually 20 per cent.

Q. How many do you buy in order to get 20 per cent? A. I think it is 15 to 25, something like that. I am not just positive because we haven't been buy-

598 *J. M. Stoodt, Cross*

ing any pumps to any extent in the last eight or ten months, but it runs up as high as 50.

Q. Mr. Stoodt, do you get this proposition, the discount that you have mentioned here from the Bowser people as well as the other? A. We get it from any of them.

Q. You get it from any of them? (No reply.)

CROSS-EXAMINATION by Judge Chamberlin.

Q. Mr. Stoodt, you speak of the amount of loss that
599 would necessarily flow from a cease and desist order to your company. Have you considered any way in which you could salvage that so as to prevent the loss? A. I do not see how it could be.

Q. Have you ever considered the substitution of an agency contract for the present lease and loan contract? A. No, we have not.

Q. You have not considered it? A. No, we have not. You mean—may I understand your question? Do you mean by allowing them, say, a cent off on the gasoline, pay a cent more on the gallon to pay for their equipment?

Q. No, no. No matter what the method of the
600 compensation might be, if you would cancel the leasing contract that you now have with your distributor and make him your agent to distribute, paying him by whatever method you might agree upon and thereby continuing the operation of your equipment? A. We have that. We haven't got it in force but we have tried to talk to dealers on that proposition, but we haven't any that are doing that in the former Lily White territory. I don't know just what there is in the territory taken over from the Carbonless Oil Company on that, but not in any territory we have been in, in that particular form.

Q. Would you, in your present situation, in order to protect the leased property—would you consider that as one of the means of protecting that leased property? A. I presume we would.

Q. In that way the economical situation would not be changed? A. Well, now, it would to a certain extent. We lose in some small towns where we have just—of course there would not be so much, where we just have a small one-gallon pump. In the winter season they do not sell gasoline in those small grocery stores probably, not enough to speak of. In the summer season their business would be very good, and, of 602
course, it would be a pretty hard matter to give them —to make them an allowance, or in other words a salary—is that what you mean?

Q. I don't care what the method of compensation is, but the point is, instead of a lease to them and an operation of the equipment by them, you yourself would operate it through them as an agent. A. Pay them a salary the same as we would any man to operate it?

Q. Salaried men. A. We haven't any of those.

Q. I see. A. We haven't anything like that, but I don't believe that that would work in all cases; it might in some, especially the larger cities, in garages 603
that have a year-round business. But whenever you do that and you run it in that way you have got to put a little bit more money in it again to make it have an appearance of a service station.

Q. Would there also be some advantage in that by being able to control the sale of your product and protect your trade-mark? A. We naturally would control all this product exclusively from that standpoint.

Q. From that standpoint it would be advantageous and would appeal to you as good business? A. Yes, I believe it would.

604 *J. M. Stoodt, Cross*

CROSS-EXAMINATION by Mr. Holliday:

Q. Mr. Stoodt, I believe you said that the system of leasing and loaning pumps that is now in force has resulted in certain savings or economies to the oil companies, that is, the wholesalers. Now, I wish, if you can, you would describe that a little more in detail. In the first place, I will ask you is it not a fact in your judgment from your experience, that the custom of leasing or loaning pumps for a nominal consideration has resulted in a much larger use
605 of curb pumps, in a greater number of pumps being installed, than there would have been had this system not been continued? A. I think that is true.

Q. And is it not a fact that the result of that larger distribution facility of the oil industry has resulted in most of the automobile owners abandoning the use of their small tanks in their own private garages? A. It has, but there is a little advantage there in the curb pump; we haven't got the man's salary to pay.

Q. Is it not a fact then that the result has been that there has been a storage of gasoline in larger quantities and the storage has been centralized and not scattered in many small tanks? A. Oh, that is true.

606 Q. And is it not a fact that as a result the oil companies, the wholesalers are able to make larger dumps and thereby effect a saving in the cost of hauling the gasoline? A. Without a doubt. If they had to make smaller deliveries the overhead expense would naturally run higher.

Q. Under the present system, it is your custom, is it not, in the morning when you start a tank driver out, to give him a routing of the dumps that he is to make of these different tanks? A. We have certain days for certain territory.

Q. Is there not an economical advantage in a tank wagon driver being able to concentrate his time upon delivery in those larger quantities without having to go from house to house and solicit orders? A. There are a great many times when we could not make it from house to house owing to the bad road conditions, especially in the country.

Q. Would not a cease and desist order tend to throw you back to that old situation of loss of economy in solicitation? A. Absolutely.

RE-CROSS EXAMINATION by Mr. Rubrecht: 608

Q. Mr. Stoodt, if you can tell us, thinking about this agency proposition, what would that require you to do if you were to establish an agency instead of leasing and loaning a tank; what additional system or plan would you have to put in operation? A. In leasing and loaning a tank we can place a pump and a tank to a place and then the man can fix it up to suit himself. If we owned that it would be necessary for us to do the fixing up and naturally we would not want to place an outfit in a service station of ours unless we would put up something like a large electric sign or something to designate and show that that is 609
our own individual stand, which would mean at least, in a small way—just a rental proposition—I presume in front of a garage, say we would rent it from a garage, a certain space to do this, and pay him a salary to run it, we would naturally have to have from $500 to $1,000 or $1,500 additional expenditure at that particular place in order to do that, because we would have to fix up a drive to drive in, and as I said before, advertising, putting up our signs and our trellis and making it ornamental as well.

610 *J. M. Stoodt, Re-cross*

Q. Wouldn't that also necessitate the system of checking up and requiring bonds and liability insurance and so on, and daily reports? A. We would be compelled to open up our own individual bank account and furnish those banks with pre-stamped envelopes to receive our reports daily, the same as we do at our service stations. It would put it on the service station plan which would naturally operate it at greater expense.

Q. It would be the same as a service station except not quite so elaborate and not quite so expensive, but
611 you would have to have the same system to run it. A. We would be compelled to; yes, sir.

Q. To use the same system? A. Yes, sir.

Q. Who would have to pay that additional expense; where would you get it? A. That would be up to the Lily White Oil Company.

Q. Would you increase the price, or in any way get it back from the public? A. No, we would have to maintain the same price that the garage man was getting. If he was getting 25 1/2 we would have to do the same.

Q. You would have to maintain the market price? A. Yes, sir.

612 Q. Then your company would lose? A. Yes, sir.

Q. You would have that much more invested? A. We would have that much more invested.

Q. And hence your profit would be less? A. Yes, sir.

Q. Now, suppose, Mr. Stoodt, that that system were made uniform and universal by the orders of the Federal Trade Commission and all of the dealers were forced to go to that, or all of the wholesalers were forced to go to that system; then who would pay the cost, the additional expense of running that? A. Will you read that question?

Q. Let me ask the direct question. In that situation would it not be necessary to raise the price of gasoline to meet that expense? A. We would have to do that if we would expect to make the same profit that we have made, if all the companies were forced to do the same thing. It would force us to do it.

RE-DIRECT EXAMINATION:

Q. Now, which do you think that it would be that this order of the Commission would do, drive the business into service stations or back into the old form? 614
You have testified it would do both. Now, which one is it? A. Well, in the case of the larger companies it would drive it to service stations.

Q. And with the smaller ones? A. The same as it had been before.

Q. It would drive it to— A. (**Interrupting.**) F dently we could not put in service stations in all our towns.

Q. It would drive you back to the old form of doing business? A. Yes, sir, without a doubt.

Q. How does it happen you do any service station business at all, if it is so economical and you are losing money at it every day? A. Is that a question? 615

Q. Yes. A. Well, we are adding a service station whenever we can and the competition demands. We are compelled to add a service station, especially in a town of any size at all.

Q. Do you make any money out of it? A. Not the money we could if we were just hauling to pumps.

Q. Why don't you haul to pumps? You say you put in about 80 pumps for the money you have in one service station. A. Because the public, now days, if there are service stations handy, would prefer going to a service station where they have water and

air and gasoline and a man to take care of them in every way.

Q. Therefore, if a service station is so much more expensive, the public is perfectly willing to pay for it? A. They won't pay an increased price.

Q. Isn't it true that they do use the service station? A. Yes, sir.

Q. Don't they prefer the service station? A. They prefer the service station.

Q. You say they won't pay any increased price? A. The service station is getting the same price as
617 they are at the time.

Q. Do you honestly believe that the public would not use that service station if it had to pay a higher price, if there were nothing else but service stations? A. They, the majority of them would not.

Q. What would they do? A. They would go to the pumps. It would split it up again.

Q. Go back to using pumps? A. Some would go back to where there were pumps, drop around here, there and everywhere where they can buy it.

Q. Through the curbstone pumps? A. They would go to the curbstone pumps.

Q. How much of the business do you think would
618 be done through the curbstone pumps if such a system came into vogue? A. That would be very hard for me to tell.

Q. Oh, no; you are an expert; you have testified as to the results of things. You must know or you couldn't get these results so definitely. A. Well, I don't know.

Q. You don't know at all? A. No.

Q. You haven't any idea of how much business would be done through the curbstone pumps if those— A. (Interrupting.) Probably 50 per cent.

Q. Do you think that 50 per cent of the pumps would stay in garages and other retail places? A. Well, that would be true if they would buy them, probably.

Q. I am asking you now as to your best impression as to the effect of the business of this proposed order. A. Perhaps they would.

Q. 50 per cent of the business would still be done through curbstone pumps; is that right? A. To start with, but it would eventually come to the service station.

Q. How is that now? A. Just as I have stated be- 620
fore. A great many people demand service and if a service station sells at the same price that they do at the garage, then they would go to the service station.

Q. How much business would finally be done through curbstone pumps? A. That is a condition we haven't lived up to yet; I cannot tell you.

Q. Well, what is your opinion about it? You are basing your judgment as to the effect of this order now on the business on your knowledge and information about the business. You must have some now. A. To start with, probably 50 per cent, but it would naturally be cut down.

Q. To how far? Your best judgment about it. A. 621
I do not believe there would be more than 20 per cent of the business would be done through the pumps.

Q. Would 20 per cent of the total business be done through curbstone pumps? A. Perhaps so.

Q. And the rest of it would be done through service stations? A. Yes, sir, probably.

Q. My recollection as to your answer to Mr. Holliday's question as to the effect of this cease and desist order is that it would drive the business back to the private ownership and small tanks; you have already consumed a hundred per cent of this business. Now,

how much of that is going back to the small tank? A. According to that there would not be any.

Q. I believe you testified on cross-examination that it was a great advantage to you to have leased pumps because it afforded you a means of advertising your particular brand of gas; is that right? A. Yes, sir.

Q. And also that if you did not have the leased pumps that you could not prevent your customers from mixing your gasoline with others? A. We could not.

Q. And that that would be a great detriment to you and to the public. A. It would.

623 Q. Isn't it a fact that right now not a single one of your customers has a pure grade of your own gasoline? A. There are some that have, but I say that they do not all—in fact we haven't got but one that uses exclusively our gasoline.

Q. In fact, every customer you have then mixes this gasoline for you today, even though you are using the lease system pumps? A. Not gasoline entirely. We have perhaps 20 per cent that do that, but there isn't a one that uses our gasoline and oils exclusively.

Q. Now, confining it to the gasoline; how many of your gasoline customers are there who do not at

624 some time buy gasoline from a competing company and mix it in the same tank in which you have had yours or have some of yours? A. I should judge we have 20 per cent that buy other gas and put it into our tanks.

Q. Over that 20 per cent your leasing system has no control at all, has it? A. Not a whole lot.

Q. Could you refuse to sell gasoline to customers who do not use in any tank that they might own your gasoline exclusively so long as they had your sign on top of the pump? A. We could, but we don't know it until after it has been put in.

625

Q. You don't know it under your leasing system until after it has been put in? A. No, but here is what we mean. We don't like to take that out of there, but we ask them if they have not had service or why they did this. They state "Because we didn't happen to have the gasoline," or for some cause or another, but before we know it they do it again.

Q. But if they owned their own pumps wouldn't it be possible to advertise Lily White gasoline on top of that pump by use of a globe, which is the common way of doing this advertising? Wouldn't that be possible even though they owned their own pumps? 626
A. Yes, but you wouldn't have any way at all then—they could do that very thing then, of course.

Q. And the next day when they wanted to buy from you you could refuse to sell them because they refused to keep your gasoline pure? A. We could refuse to sell them, but we are out to get as much business as we can.

Q. You don't care whether they mix it or not? A. We care, but we don't like to run any chance of making them angry.

Q. Have you ever refused to sell a single gallon of gasoline to a customer who mixed your gasoline with somebody else's? A. No, we haven't, but we have 627
done this; I went to see a man and said we were willing to take up the equipment and he then told me he would not do that. This was just a short time ago. I have been told—I have no substantial proof of it, but I have been told that he has done it again.

Q. You mean you had a pump and tank leased to a customer who was using gasoline of another concern and you told him you were going to remove the pump and tank? A. We told him there wasn't any use to leave it there if he was going to sell other gas in our outfit.

628 *J. M. Stoodt, Re-direct*

Q. How much had he been selling? A. I had been told that he had sold about half.

Q. You thought half wasn't enough business for yourselves? A. We thought it wasn't fair since we had the investment.

Q. But if it had been two-thirds that he bought of you, it would have been sufficient? A. Not at all.

Q. You didn't take these other pumps out because they did not use your gasoline? A. I have gone to call on all of them.

Q. Have you taken any pumps out? A. No.

629 Q. Although it is a fact that a large number of them have been mixing gasoline? A. We have about 20 per cent that have done that at times, I presume. At least, I have been told that.

Q. You didn't take any pumps out because of that? A. I haven't yet. I told him I would be willing to sell the pump or take it out if he preferred to use the other gas.

Q. Are you going to take that pump out? A. The question is still open.

Q. If he takes 90 per cent of your gasoline, was you going to take it out? A. Well, if he takes 90 per cent—if he doesn't take all of ours we have a right

630 to take it out.

Q. Are you going to take it out? A. We will give him a chance to buy it as a second-hand outfit, if he wants it.

Q. How long have you been in the gasoline business? A. I have been directly with this company, well, since a year ago last September. I have been in the gasoline business but not in the marketing end.

Q. What was your business prior to the present business? A. Interested in the marketing company.

Q. What were you doing? A. I was not operating in the oil business.

631

Q. I want to know what you were doing. I don't car so much to know what you were not doing. But what were you doing? A. Before I became active in the Lily White Company?

Q. Yes. A. I was with the Deisel-Weimer Company.

Q. What is that? A. Cigar manufacturing company.

Q. How long have you been engaged in that? A. About five years—that is, not engaged. I have been a stockholder.

632

Q. How long have you been working the gasoline game from an operating point of view? A. Since a year ago last September.

Q. And then you have actually had a year and a half experience in the gasoline game? A. Not a year and a half—a year last September.

Q. About a year then, only a little more than a year experience in the gasoline business? A. Yes.

Q. You answered these questions on the hypothesis of what the order of the Federal Trade Commission would do. What is this order of the Federal Trade Commission that you are speaking of? A. Discontinuing the leasing of tanks and pumps to garages or anyone that sells gasoline or oils.

633

Q. Absolutely? A. Yes, sir.

Q. Then I think you are very much mistaken about the order. If that were not the effect of the order, would you change your answers about this economical situation? A. No. I don't think, from what I have gone over—I thought I understood the questions thoroughly.

Q. But if you knew that the order did not have that effect, would that change your answers to these economic questions that have been put to you? A. It would not. I have left that to our attorney, too, possibly.

634 *J. M. Stoodt, Re-cross*

Q. No, but your answers to his questions as to the effect of this cease and desist order. A. Oh, no.

Q. If the cease and desist order did not have the effect which you just now described, would you change your answers? A. No. I gave those directly, according to the best of my knowledge.

Q. That is, those answers were all depending on your interpretation of this cease and desist order that you have now stated? A. Exactly.

635 Mr. Rubrecht: Well, Mr. Zechiel, if we are mistaken on the effect of this order—we are all like the witness: that is our idea of what you are striving to do.

Mr. Zechiel: If this witness represents your ideas you are all badly mistaken.

Mr. Rubrecht: Are you through with him, Mr. Zechiel?

Mr. Zechiel: I am not through asking questions, no, but you can ask him what you want.

RE-CROSS EXAMINATION by Mr. Rubrecht:

636 Q. Now, Mr. Stoodt, I wish you would listen to this language. We will get straightened out. We want to get right. "Now, therefore, it is ordered," this is a copy of an order which was issued against the Iowa Oil Company by the Federal Trade Commission, and the questions that were propounded to you were on the assumption that if an order was issued against your company and all other companies it would be the same kind of an order. It reads as follows: "Now, therefore, it is ordered that the respondent, the Iowa Oil Company, shall cease and desist from, as, directly or indirectly leasing pumps or tanks or both and their equipment for storing and handling petroleum products in the furtherance of its petro-

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leum business at a rental which will not yield to it a reasonable profit on the cost of the same, after making due allowance for depreciation and other items usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom, and from doing any matter or thing which would have the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made." Now, you have got that in your mind? A. All but the last paragraph.

Q. You mean the last sentence? A. Yes.

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Q. "Which would have the same unlawful effect as that resulting from the practice herein prohibited." That is, of course, referring to the first part of it. "And by reason of which this order is made." Now, again, too, the order prohibits "entering into contracts or agreements with dealers of its petroleum products or from continuing to operate under any contract or agreement already entered into whereby such dealers agreed or have an understanding that as a consideration for the leasing to them of such pumps and tanks and their devices the same shall be used only for storing or handling the products of respondent, and from doing anything having the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made." That gives the two phases of the order, as I undertsand it.

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Mr. Zechiel: There is a proviso here.

Q. "That as to such pumps and tanks and devices as are now leased by respondent contrary to the orders contained in paragraphs 1 and 2 herein," which I have just read to you, "respondent shall have blank months," in one case they gave them four months, "from the date hereof to enter into contracts or agree-

640 *J. M. Stoodt, Re-direct*

ments with respect to the same which will not be incompatible with the spirit and the intent of this order." That might be illustrated by the proposition that was made by one of the gentlemen here, who said, "What would be your opinion if agents were appointed and located at the various points?" I believe I asked you the question. Now, that is the other provision. "It is also ordered under and by virtue of the authority conferred on the Commission"—

Mr. Zechiel: That wouldn't have anything
641 to do with this.

Mr. Rubrecht: No, that has nothing to do with this particular matter about which we are talking to you.

Q. (Continuing.) Now, understand the question as I have given it to you from the order which we assume will be issued if an order is issued against all companies, do you wish to change your answers as to the propositions which were made to you and the questions propounded upon the various phases of the matter to which you have been testifying? A. I do not.

Mr. Rubrecht: Now, Mr. Zechiel, you can
642 go to it.

RE-DIRECT EXAMINATION by Mr. Zechiel:

Q. What effect do you think this order will have on your business anyway? A. Well, it will be just this way. The larger companies that are able to afford to and put in more elaborate filling stations, service stations, will probably in due time take care of the greatest per cent of the business.

Q. You will have none? A. You see if the garages are driven out and the business is finally carried to

service stations, in localities you can get the business of the garage through personal solicitation and in that way get them to handle your goods, and they in turn will swing their customers or their trade to your gasoline through their own place of business.

Q. Now, I don't quite understand your answer.

Mr. Zechiel: Will you read that answer?

(Answer read.)

Q. You say the garages will be driven out, and still you say you can get business from the garage. Explain that. It seems to be an inexplainable condition? A. I mean if the pumps are to remain in effect as they are and garages still continue to have such leased pumps, we can still continue to get our share of business, but if it comes the other way, some of the garages will no doubt discontinue handling gasoline if they are compelled to buy their own outfits, and of course that will eliminate a certain per cent of our business unless we erect service stations. 644

Q. You are thoroughly convinced, are you, that a big per cent, or about twenty per cent—I believe you said twenty-five—twenty per cent of the business would finally go to service stations as a result of this order if it were made? A. I think it would. 645

Q. How long had the Lily White Company been in existence when you became associated with it actively?

A. Actively?

Q. Yes. A. About four years, I should think.

Q. Do you know whether the Lily White Company immediately upon its inception into business started leasing and loaning pumps? A. Well, I am not sure of that.

Q. Did you ever personally go out and solicit business from the trade? A. Did I?

Q. Yes. A. Yes, since I was connected with it.

Q. Since you were connected with the business? A. Before that I didn't.

Q. Have you traveled about considerably over your territory? A. Yes, considerably.

Q. What per cent of the business done by garages and other retailers is done through leasing and loaning pumps? A. Outside of Lima, I should judge about eighty or ninety per cent of our business.

Q. Not your business? A. All together.

Q. All business? A. Well, I should judge at least
647 seventy-five per cent.

Q. Seventy-five per cent of all the pumps in existence now are leased and loaned? A. In our territory we have no large cities with the exception of Lima.

Q. Now, Mr. Stoodt, don't you think that the rest of the twenty-five per cent of the business which is done through privately owned pumps would likely remain, even if this order were issued? A. Well, I don't know that there are any privately owned pumps —not many. There are a few service stations.

(Previous question read as follows):

"Q. What per cent of the business done by garages
648 and other retailers is done through leasing and loaning pumps"

Q. I will modify that by adding "other than service stations"? A. I should judge seventy-five per cent.

Q. Now, when you gave your answer here of seventy to seventy-five per cent, you were not considering service stations at all? A. That is what I was thinking about. I was considering service stations.

Q. What per cent of the business is done through service stations? A. I presume it is close to twenty-five per cent.

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Q. And then your impression is that there are not any privately owned pumps in your territory at all? A. Very, very few.

Q. Let us see what are your counties? A. Well, we have Fulton, Henry, Paulding, Putnam, Mercer, Allen, Van Wert, Auglaise, Hardin, Logan, Hancock, Wood. I think that gets about all of them.

Q. Now, in all these counties it is your best judgment that there are scarcely any privately owned pumps at all, curbstone pumps, through which gasoline is sold to customers, to the general public; that is your best judgment? A. There are two, I think, at Findlay that I know of. There is one at Wausseon.

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Q. I don't care for the enumeration, but I want your best judgment about the whole thing? A. All the gasoline sold in that territory? I don't believe there is more than five per cent.

Q. Five per cent of the gasoline selling is done through pumps privately owned? A. That is my best judgment, best knowledge.

Q. Do you know when the practice of leasing and loaning pumps came into general existence in the State of Ohio? A. Well, I know of them doing that about four years ago.

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Q. Do you know how general it was at that time? A. I couldn't say because I was not out over the territory, but I know it has been done to a certain extent.

Q. What per cent of the present general distribution of oil tanks and pumps had been installed about that time, if you know anything about it at all? A. I couldn't say because I was not following that up.

Q. You don't know whether at that time there were a great many privately owned oil tanks or pumps or not, do you? A. I do not.

Q. What would you say to this: if nobody had started the leasing and loaning of pumps at all, would

garage people and retailers have bought oil tanks and pumps? A. They possibly would because the service station has just, you might say, come in within the last two years, and of course they would have evidently bought tanks and pumps.

Q. But, now, if you were restored to that condition, your opinion is different? A. It is different.

Q. What is your opinion about it now? A. Well, I don't believe that there would be more than twenty per cent that would buy their own tanks and pumps.

Q. Twenty per cent of the business would buy its
653 own tanks and pumps? A. Possibly so.

Q. Where would that twenty per cent lie, in the large cities or in the small places? A. Not practically in the large cities any more than small ones, but in the larger garages where they have perhaps a great amount of storage of cars and people that keep their cars there and call there for them; they really would need them in connection with their garage business.

Q. So that all the large garages would own their own pumps; is that true? A. All the large garages evidently would.

Q. How about the rural community, the small
654 towns? A. I don't believe you would be able to find many tanks and pumps in the rural districts.

Q. You think service stations would start up there? A. No, I don't.

Q. What do you think would happen? A. I think it would go to the larger towns where service stations or garages are at present handling it.

Q. Let us see what sized town you refer to. What is the size of the town you refer to, what is the population of the town you have in mind? A. Well, I presume it would run from towns of 4,000 up.

Q. You think then a town of 4,000— A. I beg your pardon?

Q. If you hadn't finished, go ahead? A. Possibly as low as 2,500 population.

Q. You think a town of 2,500 population, if this order were put into effect, would have no service stations or pumps? A. There would be very few in towns of that size, and possibly smaller.

Q. I am trying to fix that limit. What limit do you want to place on these small towns, about, which you have testified where there would be neither service stations or pumps, curbstone pumps? A. Well, I don't believe you would get the town of 1,500 and down.

Q. Now, you will fix it at 1,500 at this time, will we? A. You might now and then find something between 1,500 and 2,000 or 2,500.

Q. How far are you going to shove me down? I want to get there and quit. Is 1,500 low enough? A. Well, perhaps.

Q. You will say 1,500, will you? A. Yes.

Q. You think, in your opinion, then, no town—or at least it would be the overwhelmingly prevailing general condition of business that in towns of 1,500 and smaller there would be neither service stations nor oil pumps and tanks—curbstone pumps we generally refer to—if this order of the Commission would go into effect. Am I right? A. I think you are.

Q. All of those people would go to the city for their business? A. They would have to or haul it home in cans.

Q. Do you think they would haul it home in cans? A. Possibly some of them would—farmers. They would evidently have to do something like that to carry them through the season, that is during the work week when they are very busy and couldn't drive.

658 *J. M. Stoodt, Re-direct*

Q. Now, you say you don't know what was the condition as to the distribution of oil tanks and pumps four years ago? A. Yes.

Q. You are not acquainted with the business four years ago at all and you don't know whether four years ago before this system of leasing and loaning came into practice there were oil tanks and pumps distributed in towns less than 1,500, do you? A. No, I don't know anything about that.

Q. By the way, do you order your pumps shipped from the factories? A. Yes, sir.

659 Q. When you want one you write a letter to the factory for it? A. We usually buy them in quantities, five or ten pumps, and have them shipped into Lima.

Q. When you want some to come in you order them through the factory? A. Through our local salesman.

Q. That is what I am trying to straighten out. Does your local salesman do all that? A. Yes, sir; he comes out and calls on us. He lives there and keeps in constant touch with us.

Q. He comes out, and what is the result; you leave an order with him? A. If we are in need of anything, we give him the order. He has them shipped in

660 at a certain time. Of course, we take them in and put them in stock. We have a service man who installs these and if we happen to need one, he is instructed to get a pump.

Q. Now, I believe you testified that the practice of agency stations—by the way, what do you think would happen to the agency situation anyway? I believe you have testified that 20 per cent of the garage people would own their own pumps and the rest of the business, except 5 per cent would be done through service stations. What do you think about the agency system? Do you think it might come into practice if this

order were issued? A. Well, that may come into practice. It looks practicable although it would mean the expenditure of considerably more money.

Q. What per cent do you think it will develop into, of the whole business? A. That would be a service station proposition probably, in time, as I said. In the service station it would take at least, perhaps 70 or 75 per cent.

Q. That is, you are considering agency along with service station when you testify as to agency? A. Yes, sir.

Q. What experience have you had in this agency 662
line of business? A. Well, we haven't had any.

Q. You don't know anything about it? A. No.

Q. You have had about a year's experience in this kind of business? A. I think the first of September, this last September.

RE-DIRECT EXAMINATION by Mr. Lippincott:

Q. Mr. Stoodt, in your garages, for illustration at Bellefontaine, Ohio, the man in charge there is your agent, is he not? A. Yes, sir.

Q. Then when you answered Mr. Zechiel—when 663
Mr. Zechiel asked you if you had any agents and you answered you did not, you meant no curbstone men who were your agents? A. Well, I answered that in the first part of it, that we had not any in the Lily White, but what was in the Carbonless I was not quite familiar with because Mr. Mikesell was looking after that.

Mr. Zechiel: If I have this correct, it is understood that all the rest of the respondents are to agree on a stipulation as to the facts of jurisdiction, whatever are the facts with re-

spect to pumps and also as to practice. I will therefore not call these witnesses:

R. E. Goodwin, 2268 Maplewood, Toledo, who appears for C. A. Ulsh.

P. R. McLean, 11108 Ashburg, Cleveland, who appears for George R. Canfield.

Leroy Miller, care of Factory Oil Company, Akron.

C. A. Lauback, 203 Spahr Building, Columbus.

W. R. Welton, Leonard and Taylor Avenues,
565 Columbus.

Whereupon at 12:15 o'clock P. M., a recess was taken until 1:30 o'clock P. M.

JOHN H. QUINN was thereupon called as a witness and being duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. What is your name and address? A. John A. Quinn, Mansfield, Ohio, Southern Hotel.

Q. By whom are you employed, Mr. Quinn? A.
666 S. F. Bowser, Fort Wayne, Indiana.

Q. How long have you been employed by S. F. Bowser? A. Four years next January.

Q. How much of the time of your employment has been occupied in work in the State of Ohio? A. All of it with the exception of ten weeks when we laid off.

Q. That is just recently? A. Yes, sir.

Q. You are now in the employ of the company? A. Yes, sir.

Q. What is the territory over which you do business? A. I have Medina, Wayne, Richland, Crawford, Huron, Seneca, Erie.

Q. Those are counties in the State of Ohio? A. Yes, sir.

Mr. Zechiel: I wonder if we could agree with the method by which the Bowsers do business in Mr. Quinn's territory is the same as that described by the other two Bowser witnesses as to interstate commerce?

Judge Chamberlin: I guess there is no question about it.

Mr. Rubrecht: I presume they use the same methods. 668

Mr. Zechiel: Let us ask the witness.

Q. Is your general method of doing business for the S. F. Bowser Company similar to that of the other Bowser agencies in the State of Ohio? A. I expect so; I solicit all the trade, stores, groceries, garages, factories.

Q. Did you hear the other Bowser witnesses testify yesterday? A. I did not.

Q. In a general way you solicit the trade of the public and order pumps sent into that territory? A. Yes, sir.

Mr. Zechiel: Perhaps that is sufficient without any stipulation. 669

Q. Mr. Quinn in your experience with the S. F. Bowser people have you ever lost any customers or prospective customers— A. Two.

Q. Just a minute until I finish the question—because such customers or prospective customers said to you at the time that they could secure oil pump equipments from parties for a nominal consideration? A. Well, that varies in different territories.

Q. Generally over your territory. A. Take it in Mansfield it is about seventy-five to eighty per cent.

Q. Now or four years ago? A. It was when I went there.

Q. Now seventy-five per cent what? A. Seventy-five per cent of oil company outfits.

Q. Has that per cent changed any to date? A. Oh, yes; I have sold some in there.

Q. Now, you did not get my question. Read my question.

(Question read.)

A. No, it is just about the same.

671 Q. Has your per cent of sales of oil tanks and pumps in your territory increased or decreased, if either, during your experience with the Bowser Company? A. It has just been about normal every year I have been with them.

Q. About how many oil tanks and pumps do you sell during the year to garages and other retailers? A. Well around one hundred.

Q. That is per year? A. Yes, sir.

Q. How many such cases? A. Oh, I have had several of them. I said two. When I said two I meant two direct sales that I had already made.

Q. Have you ever solicted business for your com-
72 pany and been refused such business because the parties whom you solicted said they were able to secure these oil tanks and pumps from oil companies or other concerns which would furnish them at a nominal consideration? A. Yes, sir.

Q. Has that been a frequent occurrence in your experience? A. Yes, sir.

Q. When you began service to the Bowser Company in the State of Ohio, if you know, was the practice of leasing and loaning oil tanks and pumps for a nominal consideration under tying contracts a general practice among the trade? A. Yes, sir.

Q. You say it was at that time a general practice? A. Yes, sir.

Q. At that time in your best judgment what was the relative proportions of leased and loaned oil tanks and pumps and owned outright pumps? A. Yes, sir.

Q. Do you know how many you have sold since you have been in that territory under such circumstances? A. Well, I could not give you exactly the amount.

Q. Something near it. A. About 300; somewheres around there, 325.

Q. To whom did you sell in a general way, to whom did you sell these oil tanks and pumps, to large garages 674
in large cities or small garages in large cities or smaller garages in the rural territory? A. We sell them to large, some to smaller ones, factories, stores.

Q. Is it a fact or not that you sell oil tanks and pumps to towns of four or five hundred population? A. Yes, sir, and less than that.

Q. What is the general minimum population of the towns in which you sell oil tanks and pumps? A. Oh, they run anywheres from four hundred up, some less I guess. About three hundred up.

Q. Has that been true throughout all your experience as salesman for the Bowser concern? A. Yes, sir, the oil companies have not been as active in the 675
smaller places as they have in the larger places.

Q. By that what do you mean? A. They have not put out as many outfits under lease.

Q. Under lease? A. Yes, sir.

Q. By the smaller territory you mean in the rural towns, not as many as in the large cities? A. They work it two ways in the smaller territory. If they use so much they will lease it to them on the same basis as they do in larger places. If they do not they have to pay for them.

Q. What is your impression about the distribution

of oil tanks and pumps in the rural communities; is it equal to the demand for gasoline? A. I think so.

Q. Let me put that question in a little different form What is your best judgment about the facilities for handling the sale and distribution of gasoline in the rural communities, small towns; is there a fairly sufficient distribution of oil tanks and pumps to take care of the demand for gasoline, the demand and sale of gasoline? A. Oh, yes, it keeps changing; some who have smaller outfits trade them in for larger ones.

Q. You also sell for replacement in some cases?
677 A. Yes, sir.

Q. You make some original sales do you in the more rural communities? A. Oh, yes, part of them.

Q. What is your best estimate of the per cent of oil tanks and pumps in the rural communities among retailers of gasoline that are owned outright and the per cent leased or loaned? I am directing your attention to the smaller towns and rural communities. A. It is about fifty-fifty in the smaller towns.

Q. Of the fifty per cent that are leased and loaned from your experience as a salesman what per cent of those pumps would have been sold if there had
678 been no distribution of oil tanks and pumps for a nominal consideration? A. I think they could have retained about twenty-five or thirty per cent of them.

Q. And the rest of the per cent, twenty to twenty-five per cent you think there would have been no distribution of oil tanks and pumps if they had not been distributed by the nominal consideration plan? A. No.

Q. Use that remaining twenty to twenty-five per cent, what part of those pumps have been fairly continuous in their operations and what part have been more or less intermittent, staying a little while and

then removing? A. All that is in my territory are working all the while. Some sell more than others. Some have larger sales, some smaller just like anything else.

(Question read.)

A. They are about all working as far as I know. If they change hands a successor follows right along.

Q. You are speaking with respect to the twenty per cent that you could not have sold, that could not have been in existence except they were given away? A. Yes. 680

No cross-examination.

Mr. Zeichel: Mr. Examiner, W. J. Bates has been called as a witness but fails to respond.

EMANUEL STEINHAUSER was thereupon called as a witness and being duly sworn, testified as follows:

Direct-examination by Mr. Zechiel: 681

Q. Your full name, Mr. Steinhauser? A. Emanuel Steinhauser.

Q. You were subpoenaed under the name of E. Steinhauser? A. Yes, sir.

Q. And your address? A. 18 South Howard, Akron, Ohio.

Q. By whom are you employed? A. S. F. Bowser & Company, Fort Wayne, Indiana.

Q. How long have you been in the employ of that company? A. About five years; five years this January.

682 *Emanuel Steinhauser, Direct*

Q. How much of that term of employment has been spent by you in the State of Ohio? A. All of it.

Q. What is your territory in the State of Ohio? A. Stark, Summit, and Portage Counties.

Q. Mr. Steinhauser, in connection with your business with the Bowser concern have you ever solicited customers or prospective customers who have refused to buy from you stating as their reason that they were able to secure such equipments for a mere nominal consideration from oil companies or other parties?
683 A. Yes, sir.

Q. How frequent has that been the case? A. When I first came into the territory it was very frequent. That was my first two years' experience.

Q. What was it since that? A. Since that it has not been frequent.

Q. It has been frequent? A. Not been frequent.

Q. Now, were these cases cases where it was said that oil companies would furnish the equipment for a nominal consideration? A. Yes, sir, under a lease plan.

Q. Have you any explanation for the decreasing frequency of that fact? A. Yes, sir, within the last
684 year or probably more than that it has been known or said by the oil companies in my territory that they were not allowed to give away or lease these pumps.

Q. Since the decrease in the frequency of the experience you have just described have your sales increased or decreased in number? A. In the past two years my sales have increased considerably.

Q. About what per cent? A. Last year I can say it was almost double that of the year before or I mean year before last. And last year was about equal with the year before.

Q. In 19 what? A. I mean 1915—in 1916 it was about double over '15.

Q. 1917? A. 1917 and '18 were about equal. Now wait a minute, let me get that straight. In 1917 it was about double over 1916. In 1918 it was about equal with 1917.

Q. And this year? A. This year of course we have had some labor trouble. My record has been, counting that time off, my record has been larger than the previous year.

Q. There was a period during this year when you did not do any business at all? A. Yes, sir. 686

Q. That was due to the labor troubles back in the home office? A. Yes, sir. I don't believe, however, that that was altogether on account of the oil company's business. I think it was the general trend of business all over in all lines.

Q. What part of it do you think would be due to the general increase? A. You mean percentage of business?

Q. Yes; percentage of increase? A. That would be hard to state because last year I felt it was a better factory year, that factories were increasing better than garages. This year has been a better garage year. 687

Q. You have been with the Bowser concern for about five years? A. Yes, sir.

Q. When you began with the S. F. Bowser Company in the Ohio territory was there a general practice in the whole trade of leasing and loaning oil tanks and pumps to customers? A. Yes, sir.

Q. To what extent as compared with 1918 or 1917 had this practice developed? A. Do you mean to what extent did they practice it then as proportionate with what they do now?

688 *Emanuel Steinhauser, Direct*

Q. Yes, or did in 1918? A. In the earlier period the proportions were probably sixty or more per cent where they had offered it. This year I have only found two. Does that answer your question?

Q. When did the practice of leasing and loaning oil tanks and pumps begin if you know? A. It had begun before I came into the territory.

Q. When you came into the territory what per cent of oil tanks and pumps in your territory were owned by the retailers and what per cent were leased and loaned? A. Well, I said it was about sixty per
689 cent which were those where I would have had opportunities to sell where I missed the contract. I believe that applies.

Q. (Interrupting.) You have not necessarily answered the question. I am directing your attention to the pumps that were at that time installed when you came with the company or shortly after that or during that early period of salesmanship; of the pumps that were actually installed in the various retail places what per cent of such pumps had been sold outright to the retailers and what per cent were being used by the retailers on such contracts? A. You mean generally over my territory?

690 Q. I mean generally over your territory. A. I should say more than half of them were leased.

Q. Has that per cent increased or decreased? A. It has decreased.

Q. A less per cent is leased today than was then? A. Yes, sir, a great many of them have been taken out.

Q. What per cent of them are owned now by the retailers? A. That question would be hard to answer unless I could generally get my mind over the territory because in some cities they are still using

a good many of them. Some they are not. I will give you for instance in the City of Canton and Akron; they are operated mostly by filling stations, service stations. In the City of Alliance and Massillon they are controlled mostly by the oil companies who lease pumps. I would say in the rural districts that perhaps from sixty to seventy per cent of them are leased.

Q. In the cities of more centralized areas, larger cities, a larger or smaller per cent of them? A. Very much smaller.

Q. There the pumps that are actually distributed 692
are very largely owned, are they, by the various distributors or retailers? A. They are very largely owned by the retailers or filling stations are operated by the oil company.

Q. What would you say as to the general number of oil tanks and pumps in actual use today as compared with the time when you went into the service with Bowser & Company? A. You mean altogether those leased and sold?

Q. All those in use today as compared with all those in use at the time you went into service? A. I would say they are about equal.

693

Judge Chamberlin: I do not think he understands the question, Mr. Zechiel.

The Witness: As I understand the question you want to know what per cent of pumps and tanks are being used today as compared with those that were being used in my territory, that is, garage dealers that are using pumps and tanks, that were using them when I went in there.

Q. That was the intention; or to put it in a different form, if all over your territory there were installed five hundred pumps when you went into serv-

694 *Emanuel Steinhauser, Direct*

ice with the Bowser Company, compared with that five hundred how many would there be, the same number or more or less? A. There were a few of them taken out on account of filling stations.

Q. Then you would say there are slightly less pumps in use today than at that time? A. Yes, sir.

Q. You are speaking now of 1915? A. My early experience with the company. Of course in answering that question, when I said that, I was considering too that there was new business started. What I mean is there are more garages in my territory now
695 than there were when I first went in. In other words it is hard for me to make that comparison because when I first started with the Bowser Company my territory consisted of three small counties, Carroll, Harrison and—

Q. How long have you been in these counties? A. For the past two years.

Q. About how many pumps do you sell on an average in a year? A. You mean gasoline pumps?

Q. I mean oil pumps and tanks—equipments I believe you call them. A. That would be hard to state because my orders are from one to probably twenty or more tanks to an order. My orders this year so
696 far have amounted to about one hundred and thirty.

Q. Now that includes what you sell in job lots? A. That includes everything. What do you mean by job lots? Large quantities?

Q. Yes. A. Yes, sir.

Q. How many pumps do you sell on an average which you sell to private retailers one at a time? A. With the exception of factory business, all of my business is to garages and retailers, people who are starting private filling stations.

Q. You spoke of selling job lots; to whom do you sell those? A. To factories. What I mean by selling

larger quantities of tanks is a battery of them perhaps in a factory that is establishing a central oil house or something like that.

Q. How many pumps in your best judgment have you sold during this time that were installed in garages and for general retail business? A. In what time?

Q. In the year, in this last year. I am not meaning 1919. A. 1918.

Q. This is sort of an off year? A. That would be hard to estimate because my last year's business was more than fifty per cent factory business. 598

Q. Was that about half the number or a little less than half the number as you stated as being about the number you had sold in the year? A. To the garages.

Q. To the garages? A. And retail dealers of oils and gasoline.

CROSS-EXAMINATION by Mr. Holliday:

Q. Mr. Steinhauser, do I understand you to say that from your observation the number of pumps in use for the selling of gasoline has not increased since 1915? A. That question was not altogether clear. I 699 cannot say that they have not increased. I say that there has been new business starting and of course where there has been new business started there have been new pumps sold. I am not speaking of my own sales. I am speaking of all pumps and tanks sold in the territory. That is what you wanted, wasn't it?

Q. Yes. Isn't it a fact that there was an enormous increase in the use of underground tanks and pumps for the retail sale of gasoline during the year 1915? A. I cannot say to that because 1915 was my first year with the Bowser Company.

700 *I. M. Camden, Direct*

Q. Where were you in 1915? A. In Carroll, Harrison and Belmont Counties, a country district, principally.

Q. Country district with small towns? A. Yes, sir.

Q. Have you in the last year heard any talk among the garage men about some federal law or federal authority prohibiting the leasing of curbstone pumps, curbstone outfits? A. Yes, sir; where they have applied to an oil company for one on a lease plan they have been told that there was such a law.

701 Q. There has been considerable talk about that among the garage men, has there? A. Except to say that there was such a law and that the oil company would not lease it.

Q. Have you heard any gossip among the garage men that the Standard Oil Company was to blame for this federal law or federal order? A. No, sir.

I. M. CAMDEN was thereupon called as a witness, and being first duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

702

Q. You may state your name and address. A. I. M. Camden, Sarahsville, Ohio.

Q. By whom are you employed? A. S. F. Bowser, Fort Wayne, Indiana.

Q. How long have you been in the employ of that company? A. Since June, 1914.

Q. How much of that time have you spent in an Ohio territory? A. All of it.

Q. Have you always been in the same territory in which you are now? A. Yes, sir.

703

Q. What is the territory over which you go? A. Noble, Guernsey, Perry, Morgan, Coshocton, Harrison—Harrison just this last year.

Q. During your experience as an employee of the Bowser concern have you ever solicited customers or prospective customers for the sale of oil tanks and pumps and been refused such business, the customers or prospective customers stating that they would not buy because they were able to secure such equipments from oil companies for a nominal consideration? A. Very few.

704

Q. Have you ever lost any business because of that practice of leasing and loaning oil tanks and pumps? A. I might have lost one or two orders but it was orders that I didn't care much for, on account of the financial standing. The oil companies on the leasing proposition down there have never been active in my territory.

Mr. Rubrecht: You say they never have been?

The Witness: No, sir.

705

Q. What per cent of the pumps that had been installed and were operated at the time you became an employee of the Bowser Company were privately owned and what per cent were under lease contracts? A. I would have to say in my territory where I work now and have been at this time ninety-five per cent of it is sold outright, privately owned.

Q. Is that true now? A. Yes, sir.

Q. What is the general population of the counties and towns in your territory? A. Well, from villages of fifty people up to thirty-five thousand. Zanesville is the largest town.

Q. How many cities or towns do you have above ten thousand? A. Just about three.

Q. And is what you say about the per cent of owned outright pumps by retailers true of the towns above ten thousand or cities above ten thousand as well as the rural communities? A. Just about the same. In my territory we did not have a service station installed until this last six months and we have been off on a strike—one in Zanesville owned by the Standard Oil Company.

Q. How many pumps do you sell on an average in a year? A. Just about one hundred orders a year.

Q. Is that orders for pumps? A. General line.

707 Q. About how many pumps do you sell? A. Just about one hundred pumps a year.

Q. Oh, about one hundred pumps a year; has that been your average for the last three or four years? A. Well, in 1917 and '18, I was off through sickness; an average of about three or four months each year, and this year I have been off on account of a strike.

Q. What would you say about the relative sales made there during the other years than this year? A. Fifteen and sixteen was my good years.

Q. You sold less in '17? A. I did not work all the time.

Q. About how many did you sell during the time
708 you worked? A. Well, I suppose I sold each one of those years about fifty outfits for the time that I worked in each year.

Q. When you were selling, the year you sold about one hundred outfits, about what per cent of the total installation of oil tanks and pumps did you sell; I mean the total in your territory; in other words what per cent of the business did you get? A. Well, I got I expect, seventy-five per cent of the business. At that time I had no competitors you might say. A fellow would just drop in now and then—no regular men in the territory with me. They won't stay there.

Q. Did you sell oil tanks and pumps in towns of below 1,500 population? A. Yes, sir.

Q. What was the average minimum size then in which you sold oil tanks and pumps? A. Well, in the neighborhood of four to seven hundred.

Q. Do you still sell such equipments in that size towns? A. Yes, sir.

CROSS-EXAMINATION by Mr. Taber:

Q. The country that your territory is in is a very hilly country? A. Yes, sir, rural districts and very 710
bad roads the year around.

Q. And the roads are bad throughout the whole territory? A. Yes, sir.

W. S. CAMDEN was thereupon called as a witness and being duly sworn testified as follows:

Direct-examination by Mr. Zechiel:

Q. Your name and address? A. W. S. Camden, Sarahsville.

Q. By whom are you employed? A. S. F. Bow- 711
ser Company, Fort Wayne, Indiana.

Q. How long have you been with that company? A. About four years.

Q. What relation is the Camden who just testified to you? A. Brother.

Q. He is your brother? A. Yes.

Q. Do you sell in the same territory your brother sells? A. No.

Q. What is the territory over which you sell? A. The southern part of the state.

712 Q. Could you name the counties? A. Gallia, Jackson, Vinton, Meigs, Athens, Hocking, Washington and Monroe.

Q. How long have you been in this territory? A. About four years.

Q. What per cent of the oil tanks and pumps that were installed at the time you began your service with Bowser & Company in this territory were leased and loaned and what per cent were owned outright by the retailers? A. All of them were owned that I know of.

713 Q. What size towns do you have, or cities, in your territory? A. Oh, from fifty people up to twenty-five hundred.

Q. Twenty-five hundred do I understand you to say? A. Twenty-five thousand.

Q. How many cities are there above ten thousand in your territory? A. Four, I think.

Q. What is the average size or the minimum size of towns in which you sell these pump equipments? A. In all sizes down as low as the cross road stores.

Q. Where there are only a few inhabitants? A. Yes, sir, I have a lot of them in my territory.

Q. What per cent of the oil tanks and pumps in
714 your territory today are owned outright by retailers and what per cent are under lease contracts? A. I think they are all owned outright that I know of but two.

No cross-examination.

716

J. E. HOMSHIRE was called as a witness, and being duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. Your address? A. Albion, Indiana.

Q. By whom are you employed? A. S. F. Bowser and Company, as a special salesman.

Q. Where is your territory? A. I have no regular territory.

Q. Do you sell in the Ohio territory? A. I have some this year.

Q. Did you sell any prior to this year? A. Oh, yes, I have worked in Ohio each year.

715

Q. For how long? A. For twelve years.

Q. What has been the general territory over which you have worked? A. I have worked with other men and I have worked in all parts of Ohio.

Q. From your experience in the sale and distribution of pumps are you acquainted with the oil tank and pump industry as it relates to retailers of gasoline throughout the State of Ohio? A. I am.

Q. How long have you been acquainted with that situation? A. I would judge about five years, since 1915, anyway; four or five years.

Q. In your experience as a salesman for S. F. Bowser & Company, what has been the average minimum size town in which you have sold such equipment? A. From one store up, a town of one store and one house.

717

Q. Are you sufficiently familiar with the general situation over the State of Ohio— A. (Interrupting.) I am.

Q. Just a minute. A. Excuse me.

Q. To make a statement as to the general practice of oil tanks and pumps in the state that are leased and loaned, as compared with those that are owned out-

718 *J. E. Homshire, Direct*

right by various retailers of gasoline? A. Not in the state; in certain localities.

Q. In the localities with which you are acquainted, will you give the locality generally and also the per cent of pumps that are owned outright by various distributors—retailers? A. In the locality in and around Toledo—that is where I have worked lately, in the last year, that is in the last six months—I would judge there was 80 per cent owned by the oil companies.

719 Mr. Taber: How many?

The Witness: 80 per cent in and around Toledo, in that territory, the surrounding counties in Ohio.

Q. Go ahead with the rest of them that you are acquainted with, the rest of the territory you are acquainted with. A. I used to work in Darke County; that is over around Greenville.

Judge Chamberlin: He says that 80 per cent of the tanks are owned by oil companies. That is not responsive to the question.

(Question read.)

A. Does that apply to the curb pumps?

720 Q. I am speaking of curb pumps. A. I will stand by my assertion that at least from 75 to 80 per cent are owned by the oil companies, in my judgment.

Q. By the oil companies, are you referring to the retailers or the wholesalers? A. I am referring to the wholesalers, that is, the oil companies.

Q. When you say "owned by the oil companies" you mean that they are installed under lease and loan contracts? A. Yes, sir.

Mr. Zechiel: Is that clear then?

Judge Chamberlin: Yes, sir.

721

Q. Now, with respect to the other territories? A. In other territories—I go into territories where there is no—where they are all owned by individuals, the business man.

Q. What territories have you in mind now? A. Territories in Indiana and Michigan.

Q. I am not speaking of those territories; I mean Ohio. A. Excuse me. I worked some down in around Sarahville where Mr. Camden lives. We didn't find that competition in that territory.

Q. Are you acquainted with any other territory in Ohio? A. I am not familiar with it, not where they are not operating. 722

Q. What do you find about the Michigan territory? A. Well, I don't find much of that work gong on.

Q. You mean that there are not many leases and loans in the Michigan territory? A. Not as much, no, sir.

Q. What part of Michigan are you referring to now? A. I work in all parts of Michigan.

Q. That is true throughout the state? A. Yes, sir.

Q. How about Indiana? A. Not so much; very little.

Q. There are leases and loans in Indiana though, are there? A. I think there are but very little—very few. 723

CROSS-EXAMINATION by Judge Chamberlin:

Q. Mr. Homshire, you say that there are about 80 per cent of the curb pumps and tanks in the Cleveland district— A. Toledo district.

Q. Oh, Toledo district? I understood you to say the Cleveland district. A. No, I did not mention Cleveland.

724 *J. E. Homshire, Cross*

Q. Well, then, in the Toledo district, that are owned by the oil companies and leased to the distributors? A. In my judgment, yes, sir.

Q. How did you form that judgment? A. I formed that judgment by calling on the garage trade.

Q. Did you make any particular note at the time that you called? A. Well, not exactly, but it was an every day occurrence.

Q. Did you ascertain from the garage man whether in leasing those pumps and tanks they were paying a nominal rental or no rental, or a compensatory rental?
725 A. A great many of them claimed they were paying one dollar a year.

Q. All of them paying a dollar a year? A. I didn't say that—a great many of them.

Q. What proportion of them? A. I should judge at least one-half of them.

Q. How did you arrive at that; did you make a notation? A. Not exactly, no, sir.

Q. Did you call on all of the trade in the Toledo vicinity and Toledo? A. I called on the trade outside of the City of Toledo, in the counties.

Q. This statement does not apply to the City of
726 Toledo? A. No, sir, not in the City of Toledo.

Q. Now, what territory outside of the City of Toledo did you visit? A. I visited the counties surrounding Toledo.

Q. The counties surrounding Toledo? A. The counties, smaller towns.

Q. That is all within the County of Lucas? A. I visited Lucas, Ottawa and Fulton.

Q. Defiance? A. Defiance and Hancock.

Q. Wood? A. Hancock.

Q. Hancock? A. Yes, sir, and Putnam.

Q. Allen? A. How?

727

Q. Allen County? A. No, not Allen County, not this year; no.

Q. Not this year; how many garage men do you visit? A. I would visit every garage man in the county.

Q. How many would that be? A. How many in a county? That would be pretty hard to tell.

Q. You must have kept some sort of account of it? A. Yes, sir, by the pumps and what the garage men told me.

Q. How many pumps were in the county? A. I didn't keep an accurate check of them. I said in my best judgment. 728

Q. What? A. I said in my best judgment.

Q. In your best judgment? A. Yes, sir.

Q. Then you don't want to say to the Commission that there is any accuracy in that statement? A. I say in my best judgment.

Q. You did not form that judgment as the result of keeping any check or any account? A. I make a daily report on every pump I call on—every customer, and I form that judgment from this daily report.

Q. Daily report to whom? A. To my company on what style pump I find in the garage, that is, what make of pump? 729

Q. Did you report also the manufacturer? A. Just give the name of the pump manufacturer.

Q. The name of the pump? A. That is the manufacturer of the pump—the name of the pump.

Q. Were there a larger or lesser number of Bowser pumps than other pumps? A. Lesser.

Q. What was the purpose of this examination of this territory by you? A. That is my business.

Q. Was there a particular purpose? A. Yes, I have to make a report on every man I call on.

730 *J. E. Homshire, Cross*

Q. Were you asked by the Bowser people to make— A. (Interrupting.) To make a report and give the names of different pumps that are used.

Q. You are a little bit fast? A. All right; I will wait.

Q. Were you asked by the Bowser Company to make an investigation of this particular territory, and report? A. No, sir, no.

Q. How? A. No, not at all.

Q. How did you come to make that investigation? A. The simple fact is this, that we could not
731 keep a man in this territory on account of this condition and they sent me in there to do the work in that territory, and that is the way I found it out.

Q. Did the other companies that were supplying the trade in this territory object to this method, or were they rather in favor of this method of doing business? A. What companies? I don't know anything about any other companies.

Q. You didn't make any investigation as to their attitude? A. Why, sure not. It is my company—

Q. But you found the other companies were selling more pumps than the Bowser people? A. I didn't find that the other companies were selling more pumps
732 than the Bowser people.

Q. You found— A. I found that there were more leased, that the principal business was done in leasing pumps; that the oil companies were just as active as the salesmen in getting these leases.

Q. My question is, did you find more pumps manufactured by other companies than were manufactured by the Bowser Company under lease? A. I really think I did, but I am not sure as to that.

Q. You are not so certain about that—as to the number? A. No, sir.

Q. Wasn't that a more vital question to you? A. No, not at all.

733

Q. Not at all? A. No.

Q. In what way are you compensated, by commission or salary? A. Your Honor, do I have to answer that?

Examiner McCorkle: You need not tell the amount. He doesn't ask the amount. Just tell him how.

The Witness: I am a salaried man.

Examiner McCorkle: You have no desire to know how much salary he gets?

Judge Chamberlin: No, I don't care what salary he gets. I hope he is getting a good one.

734

The Witness: I hope so, too; I need it.

Examiner McCorkle: Well, everybody needs it.

Q. Do you feel your company was being put to any special disadvantage by the purchase of pumps by oil companies from you and disposing of them under lease to the distributors? A. Do I feel they were put to any disadvantage?

Q. Yes. A. Well, I never gave that a thought, simply because we didn't—I wasn't interested in that at all—see?

Q. What is your judgment in regard to that now? A. I don't know as they was put to any disadvantage; I couldn't say that they were or were not. I wouldn't like to answer that.

735

Q. You take orders, do you? A. Yes, sir.

Q. Do you try to sell to the oil companies? A. No, I never canvassed the oil companies; that was out of my line of business.

Q. Why didn't you? A. Simply because I had no right to. I called on nothing but simply the general line trade.

Q. Are they in a part of the general line of trade? A. My job was the garage trade, the store oil trade,

736 *J. E. Homshire, Cross*

paint oil trade—I had nothing to do with the oil companies, never sold an oil company a pump.

Q. Why was that? Because the larger trade was reserved to the company itself? A. Well, not exactly. My business was working a great deal with other salesmen. That is before the war, you understand, when we were putting on new men and we had nothing to do with the oil companies.

Q. When you are working with other salesmen do you ever suggest to them, or did you yourself make the suggestion that they should make the suggestion
737 to distributors that they might apply to oil companies? A. No, sir.

Q. To get pumps? A. No, sir.

Q. Never did that? A. No, sir.

Q. You were interested merely in making the sale direct? A. Direct, that is, in the general trade. That was my business.

Q. Isn't it a fact, Mr. Homshire, that the Bowser Company reserves certain lines of trade to itself which they do not permit the agents that you instruct to solicit? A. They have factory men and they have general line men.

Q. General line men? A. Well, yes. I work with
738 the general line men. We don't call on the factory trade you see—general line men.

Q. Just what do you mean by factory men? A. Why, a factory man is a man that calls on the factory trade.

Q. What is the factory trade? A. The factory trade is large factories in each town.

Q. Does that include the oil companies? A. I don't know whether it would or not; I never had that trade.

Q. Do you mean by that that they sell in quantities, more than one? A. I mean this, that they

quite often furnish a factory with a large number of tanks; they would pick out their factory. It takes a factory man to handle that line. 739

Q. How about the wholesalers? A. The wholesalers?

Q. And jobbers? A. I never call on the jobbers.

Q. Do they? A. Not that I know of, not in my judgment.

Q. Doesn't the Bowser Company sell to jobbers? A. Not in my judgment they don't.

Q. Would they sell to oil companies on the same terms as to the factories? A. I don't know; I never sold them. 740

Q. Haven't you any information in regard to that? A. No, sir, I haven't.

Q. Have you ever heard that discussed with the Bowser people? A. No, sir.

Q. Do you meet with the executives of the Bowser Company? A. No, sir, no, I don't, not frequently.

Q. From whom do you receive your instructions? A. Why the general manager of my district.

Q. Have you ever talked to the general manager about this other trade? A. About what?

Q. About the factory trade and large quantity trade? A. No, sir. 741

Q. Have you ever had any authority to make any different prices or discounts? A. No, sir, none whatever.

Q. None whatever? A. No, sir.

742 *B. N. Milliron, Cross*

B. N. MILLIRON was thereupon called as a witness, and being duly sworn, testified as follows:

Direct-examination by Mr. Zechiel:

Q. What is your address, Mr. Milliron? A. Waldorf Hotel, Toledo, Ohio.

Q. By whom are you employed? A. S. F. Bowser & Company.

Q. How long have you been employed by that company? A. Between nine and ten years.

Q. During that time where was your territorial
743 experience? A. Varied; about twenty-five states.

Q. How long have you been working in the State of Ohio? A. Partially for the last four years.

Q. You mean part of your time for the last four years? A. Part of my time, because the majority of it up to the first of July comprised factory work in cities in Ohio, Indiana and Michigan.

Q. What is your line of employment with S. F. Bowser? A. My line of employment up until about five weeks ago was engineering work in factories alone. Since the labor conditions in our factories have been as they are, I was asked to take five counties between Springfield and Lima to fill in the gear
744 on the general line of work.

Q. You are or are not acquainted with the general distribution of oil tanks and pumps among retailers of gasoline in the trade generally? A. Only from observation and what I have come in contact with in the last four or five weeks.

CROSS-EXAMINATION by Mr. Taber:

tities than one or two tanks to a customer? A. Yes, my orders run anywhere from a thousand dollars to

fourteen, fifteen and twenty thousand dollars, comprising a number of them.

Q. The number of tanks you sell, the number of outfits to any one party? A. The highest number I sold to any party was 112.

Q. What kind of business was that? A. That was a factory at Nitro, West Virginia, government plant.

Q. That was a government order; have you ever sold to any of the oil companies anywhere? A. Personally?

Mr. Zechiel: I think I shall have to object 746
to the question.

Mr. Taber: He said that he sold in factory quantities which the former witness defined as being business aside from individual sales.

Mr. Zechiel: If you want to make him your witness, I cannot object, but you are cross-examining him upon a subject now which I did not touch in my cross-examination.

Mr. Holliday: Have you a rule before the Commission that we cannot cross-examine as to any matter except that which you have brought out on direct?

Mr. Zechiel: We follow that rule. You 747
can make him your own witness.

Mr. Taber: We are not making him our witness.

Mr. Zechiel: Then I object.

Examiner McCorkle: I think we have been so liberal in wanting to get at the bottom of this thing that we ought to allow most any question that will throw any light on it.

Mr. Zechiel: On that theory, I withdraw my objection.

The Witness: I haven't handled oil companies directly; I have called in several instances.

748 *B. N. Milliron, Cross*

Q. Have you ever made quotations to any of the oil companies? A. I have made quotations on special appointments, on the advice of my general manager, or district manager.

Q. That would include an order for a large number of outfits, wouldn't that? A. Any number.

Q. Now, you may state what the terms were that were offered? A. The terms are the same to one and all, from an individual buyer, and factory buyer or oil company buyer. The terms are open and above board and an equal price asked of everybody.

749 Q. What is the discount allowed? A. The discounts vary according to the number of equipments purchased.

Q. On an order, say of twenty-five outfits, what would be the terms of the discount? A. Am I compelled to answer that?

Examiner McCorkle: What do you want to know the discount for?

Mr. Taber: I want to show the manner on which the discounts are allowed on quantity sales; the conditions under which they are allowed, as I understand the theory.

750 Examiner McCorkle: We don't want you to give away any trade secret.

Mr. Taber: It isn't any trade secret because it is open competition.

Examiner McCorkle: If it is an open method I don't see why it should be objected to.

The Witness: On five pumps anybody is entitled to five per cent. From five to fifteen outfits they are entitled to ten per cent. From fifteen to forty-nine outfits they are entitled at present to fifteen per cent and all quantities ranging higher than that is figured at the time.

751

Q. Figured at the time, if an order was given to you for twenty-five outfits to be delivered through the year, what is the manner in which the discount would be computed and when would it be allowed? A. They sign a quantity purchase arrangement, if I can give you that exactly from memory. They agree to buy so many pumps. They are to obtain a discount. I cannot say definitely now without looking it up, whether they are entitled to that discount in the beginning or whether they are entitled to it after all the outfits have been furnished. I couldn't say as to that.

752

Q. Isn't it a fact that the quotations at the end of the year—if they have taken out that many that they send them their rebate for the excess that they have paid on the first few deliveries; isn't that correct? A. I couldn't say off-hand on that question exactly.

Q. You have made those quotations? A. I have made several of them, but the discounts on the ones I have made have been allowed because the quantity ordered at that time justified the discount which was to be received.

Q. Were they all for one shipment? A. Every one I have sold have been for one shipment.

753

Q. If a company placed an order with you for its requirements for the year, then if they had purchased, say twenty-five, at the end of the year, they would get a rebate to bring their discount to that point, wouldn't they? A. As I stated before, every order I have taken, the number of equipments ordered have been shipped at the time to justify the discount which they received. I said before, I couldn't say off-hand without looking up one of the contracts.

Q. You haven't one of them with you, have you? A. I haven't.

Q. I will ask you if it is not a fact that you have lost some orders by that requirement of only giving

754 *B. N. Milliron, Cross*

the discount at the end of the year in the form of a rebate and the other pump companies were allowing a discount at the time that the purchase was made upon each individual shipment of that company? A. I have lost business to other companies, which everybody does. I don't know why; they have never told me exactly why they purchased from other companies, whether it was on that ground or not. We don't get all the business; we don't expect to.

755 Mr. Zechiel: I notice that Mr. Romer does not seem to be here. Mr. W. E. MacEwen, of Cleveland, Ohio, has been subpoenaed to appear here. He hasn't appeared. I am not certain that I want to take Mr. MacEwen's deposition, but I should like to reserve the right to do so, and with that reservation of right, that completes the Commission's case.

Examiner McCorkle: Mr. Romer isn't here, and you don't expect him?

Judge Chamberlin: Mr. Zechiel, in reserving this right to take the deposition of Mr. MacEwen, do you expect to develop testimony from him aganst any of the respondents?

756 Mr. Zechiel: You mean specially?

Judge Chamberlin: No, generally. That is, on the general question.

Mr. Zechiel: On the general question. Mr. MacEwen testified before the Commission in Washington and I understand he is out west and perhaps has not received the subpoena. At this moment I am not certain that I shall want to take his testimony by deposition, but I rather think I shall want to do so.

B. A. MATTHEWS was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct-examination by Mr. Holliday:

Q. State your name and address? A. B. A. Matthews, 595 East Broad, Columbus.

Q. What is your occupation, Mr. Matthews? A. I am a special agent and director of the Standard Oil Company of Ohio.

Q. How long have you been employed by the Standard Oil Company of Ohio? A. Thirty-five years. 758

Q. You in that time have been in the marketing department of the Standard Oil Company and been familiar with its operations throughout the State of Ohio? A. Yes, sir.

Q. Mr. Matthews, I want to direct your attention to two general subject-matters: first, the economical features of the present condition in the marketing at wholesale of gasoline in the State of Ohio under the prevailing custom of leasing and loaning curb outfits for a nominal consideration; and secondly, the economical features which in your judgment would result from any order which caused the system of leasing and loaning such outfits for a 759 nominal consideration to be stopped. Now considering then first the present economical situation will you state to the Examiner in a general way the economical features of the present situation and in doing so contrast them with the condition that existed prior to the adoption of this custom of leasing and loaning? A. One of the first problems of the oil industry has been to keep pace with the rapid increase in the consumption of gasoline. In the State of Ohio in about four years automobile registrations have gone up from about two hundred and fifty thou-

sand to over five hundred thousand. The companies so far have kept pace in the production of gasoline. Then the next problem was to provide facilities for handling and marketing the increase. The conditions of marketing gasoline four or five years ago were too crude to take care of the present largely increased output and the large number of automobile owners. At that time nearly all of the gasoline dealers sold oil from above ground tanks, some made of tin, some of galvanized iron, some had a faucet in the bottom, some a pump at the top, some were located in base-
761 ments, some were located in the store rooms, some were located in outside sheds and some on the ground. It was a very crude method for the dealer to handle gasoline and it was a great fire hazard. The problem of marketing, of getting gasoline to the dealer was handled by the oil companies building more stations and putting on more tank wagons and trucks so as to get it to the dealer. Then the problem was to furnish facilities so that the automobile owner could get gas conveniently and it is manifestly evident in a city like Columbus with so many automobiles as we have here they could not load on the curb, and in a city like Columbus it has developed from the tank I re-
762 ferred to to the curb pump. Then the next development in the large city was from the curb pump to the service station. Now in the natural evolution of the business it went from these insecure tanks to leased pumps. This to start with took care of the cities and at present takes care of the rural districts and the smaller cities, the leased pump. Now, you might say, "Why was it necessary to lease the pump?" For the simple reason that enough dealers could not be obtained to buy pumps. We could afford to buy pumps Therefore, to provide facilities the oil companies con-

ceived this plan of leasing pumps to dealers who could not afford to buy them as a rule. In some cases they were leased to people who could afford it because they preferred the lease plan. But as a rule it extended and made more convenient the filling of a private automobile so that they could fill up conveniently whenever they ran out.

Now, I will give you a few reasons quickly or in as few words as possible as to the reason that I think this is a good practice. In the first place it identifies the company's product. Most manufacturing concerns who put out trade-marked goods put them out in packages and the trade-mark is on the package. Therefore, there can be no deception. You cannot trade-mark gasoline. There is no way of putting it up in a package so that it can be trade-marked as it is pumped directly into an automobile. Now, the only method of trade-marking that gasoline is to provide a pump with a trade-mark on the pump and with the understanding and agreement that no other gasoline will go through that pump than the gasoline that is represented by that trade-mark. Then when a company advertises a particular brand of gasoline the customer who sees that trade-mark on a pump and knows that that particular gasoline is coming from that pump will not be deceived thereby. It is absolutely the only way that I know of trade-marking gasoline, that is, practical way. This installation of the pump in the first place is considered as an investment not an expense. It is just as much of an investment, of invested capital, as the tanks at the distribution station, for the reason that if for any reason this tank and pump are taken out it can be placed elsewhere. Therefore, it has a value as an investment.

Now, this investment pays a good interest from an advertising standpoint and from the standpoint of

protecting the trade-mark. It pays a substantial interest on the investment. As I said before it protects the consumer against deception and gives communities convenient places for filling. And one of the special advantages is in reducing the fire hazard. Companies with sufficient money, garages or dealers with sufficient money, true, can buy the right kind of equipment. But the average dealer does not have sufficient funds to put in this equipment, therefore, when we install or when any oil company installs this equipment and takes out a poorer equipment it is im-
767 proving the fire hazard

Now, I am in favor of this practice being continued for the reason that if it were by order discontinued—

Q. (Interposing.) Just a moment, Mr. Matthews, before you come to that; let me ask you whether, considering these curb outfits as an investment, as you do, there has been any other advantage accruing to the oil companies in the matter of expense in delivering gasoline and in soliciting orders for gasoline? A. Yes.

Q. Will you explain that? A. It has decreased the expense of the delivery for the reason that when the oil company makes an installation it is generally a
768 considerably larger installation than they had previously had in. We usually put in as large a tank as the situation will warrant, and whenever we can make a large pump instead of a small one it decreases the expense of delivery.

Q. How does the storage capacity and its location since the adoption of this custom compare with the storage capacity and its location before the adoption of that custom? A. Well, the storage capacity has increased and the locations are more numerous under the present plan.

Q. What has been the effect of the adoption of this custom and the installation of numerous pumps at the curb; what has been the effect of that upon the habit of the automobile owner to store gasoline in their home garages? A. Quite a large per cent of the automobile owners who formerly had insecure and inexpensive tanks at their homes have abandoned them and now go to the curb pumps on account of more convenient filling and less fire hazard around their homes and less leakage.

Q. Would you say then as a result of this condition there has been a shortening of the haul and an 770
increase in the amount of gasoline that is carried per mile? A. I would not say it has decreased the length of the haul. It has made the stops less frequent and the deliveries larger.

Q. Yes. Go on where I interrupted you. A. There is only one other point that I had thought of here and that is that I am in favor of this practice of leasing pumps continuing for the reason that in my opinion if it were stopped a worse condition would follow.

Q. It would? A. Such as the agency plan and installation plan of sales and many other subterfuges would undoubtedly be adopted especially by the smaller 771
companies. The larger companies probably would not take as many chances, and in that case they would be forced to put in filling stations to take care of the situation in all towns over, say two thousand population.

Q. It is complained of, Mr. Matthews, in regard to the present system of leasing and loaning tanks for a nominal consideration that that tends to freeze the industry, to make it hard for smaller and new wholesalers to compete. I will ask you whether that is in your judgment correct and whether in your

772 *B. A. Mathews, Direct*

judgment an order to cease and desist if carried out would thaw or would tend to freeze the competitive conditions of the industry? A. My opinion is that the leased curb pump has been very beneficial to the small jobber, more so than the larger companies. It gives them a chance to work in.

And I think there has been just as generous a flow of competition under the present system as under the old and in fact the competition has grown stronger under the present system than under the old.

773 Q. I will ask you whether or not the garage men and retail dealers who are leasing pumps and outfits for a nominal consideration in your observation are changing their source of supply from time to time under this present system? A. They frequently do.

Q. I will ask you whether or not there is competition among the wholesalers in procuring the patronage of retailers who are using leased outfits by persuading them to throw out the leased outfit which they have and put in a new outfit of the new competitors? A. Very strong competition

774 Q. I will ask you from your experience in the industry, before the method of leasing or loaning for a nominal consideration came to be practiced, whether or not the retailers were accustomed to buy more fairly constantly from one source of supply, and ask you to describe that condition? A. I think they bought from one source of supply under the old plan as much as they do under the present. I do not believe that there are any more changes under this plan than there were under that. Dealers are continually changing from one company to another.

Q. You mean then that while a garage man would occasionally buy a small quantity from someone who passes by that for the main bulk of his supply he relied upon one source of supply even before this leasing system came into effect? A. Largely, yes, largely.

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Q. There was not, however, under that system any certainty that there would be no mixture of gasoline with the gasoline of the principal scources of supply, was there? A. No, there was no protection to the consumer.

Q. Assume for the moment, Mr. Matthews, that an order were issued under which all of the wholesalers and jobbers of petroleum products in the State of Ohio should discontinue furnishing pumps and outfits to retailers at a nominal consideration; assume that everybody complied strictly with the spirit as well as the letter of the order; what in your judg- 776
ment would be the effect in regard to competition; would it make competition easier or more difficult for the small wholesaler and the new retailer? A. Why I do not think that that would—I would not think that that would make any special difference in the character of the competition.

Q. Why? A. Well, there would be the same competition in the field and working under the same conditions. I do think that the small competitor under this plan has a wider scope for increasing his business than under the plan that you describe. I think under the new plan, as I said before, it would result in a worse condition on account of the agency pro- 777
osition and long time installations and other subterfuges.

Q. I will ask you what essential difference there would be between a custom of a wholesaler making a retailer his agent and selling the wholesaler's gasoline exclusively in a tank furnished by the wholesaler and the present system of leasing or loaning for a nominal consideration? What, if anything, is the essential difference between those? Would there be any real economic change? A. The agency plan would give the dealer the same advertising facilities

and the same method of protecting his trade-mark but it would be undesirable and so undesirable that a large company could not afford to undertake it on account of the danger of accidents. If they would appoint agents, in my opinion they would be responsible—the company appointing the agent would be responsible for any accidents resulting from the careless handling of gasoline on the premises. If that is true then the smaller companies might take that chance but I doubt whether the large ones—

779 Q. (Interposing.) I will ask you whether or not from the standpoint of auditing and inspecting, and so forth, that method of handling the gasoline through an agency would be more or less expensive to the wholesaler than the present system of leasing and loaning? A. Yes, more expensive to handle.

Q. Why? A. Because you would have to keep a very careful check on the work of the agent and provide for regular installments. It would have to be run somewhat on the order of a separate station with very careful auditing.

Q. Do I understand you to say in your judgment the larger companies at any rate would not care to enter into any such agency arrangement? What other

780 alternatives then would there be for them? A. One plan would be to sell on the long term installment plan and then they could on the side rebate the amount of the installment payment and in that way practically furnish an equipment free.

Q. In your judgment would the larger companies do that? A. No, I doubt whether they would.

Q. What in your judgment would the larger companies do? A. In my judgment they would be forced to build expensive service stations to take care of the trade.

Q. Mr. Matthews, referring back for a moment to the question of fire hazard which you have mentioned when that cruder method prevailed, which you described of above ground storage tanks, what was the method of pouring the gasoline into the automobile tank? A. Very crude and dangerous method. Into the automobile tank?

Q. Yes. A. I might say first the method of pouring it into the storage tank was crude—a very crude method. The tank wagon driver would draw the gasoline in front of the store into buckets and carry in a funnel, and frequently with the tank in the back 782 end of the store or some dangerous place, put the funnel in the tank and pour it into the funnel. In that case whenever the gasoline fumes reach the air and unite with oxygen it makes an inflammable and combustible material. Then again there is a danger in pouring gasoline from an open vessel into an automobile through a funnel. The fumes are rising and if someone comes along with a match or a lighted cigar there is liable to be a fire. With the curb pumps they put the nozzle down into the tank of the automobile and it is pumped direct and the gasoline does not in any way reach the air. Therefore, there is no danger comparatively—in the comparative use of the 783 curb pump.

Q. Mr. Matthews, in your observation is this furnishing gratis of containers and facilities in connection with the sale of trade-marked goods peculiar to the petroleum industry? A. No, it is not. It is done by other manufacturers. I cannot give you the names of those manufacturers but it is quite a common practice.

CROSS-EXAMINATION By Mr. Zechiel:

Q. Mr. Matthews, would you have any objection to garage people owning all their own equipment as a system of doing business? A. No.

Q. Do you believe that all these good things that have resulted to the trade through the use of pump equipment are the result of the practice of leasing and loaning oil tanks and pumps? A. All of what good things do you refer to?

Q. You have testified to so many of them here I
785 cannot recall them all, but all these that you have testified to? A. Where I have said that they resulted from the installation of leased tanks I stand by the testimony.

Q. That is just the difficulty. I think you have testified that they have been the result of the installation of the tanks. That is not my question. I am asking you whether you think they resulted from the leasing and loaning practice? A. Well, I will answer that by saying that I include loaning under the same plan as leasing. When I speak of leasing I mean leasing and loaning in other words.

Q. I am referring to it in that way. My question
786 is, do all these good things you have described now as being a result of the installation of equipments also all the result of the practice of leasing and loaning pumps? A. I cannot answer your question in that way.

Q. You can answer it any way you please. A. I gave the reasons why I thought that the installation of leased outfits had been a benefit to the industry. I did not say that all of the benefits to the industry had resulted from leased outfits.

Q. That is just what I wanted. What has caused the benefits then, the installation or the lease and

loan proposition? A. They were installed in order to keep up with the procession with the automobile increase—

Q. (Interposing.) I am afraid you are not going to answer my question.

Mr. Holliday: Let him answer.

The Witness: I am answering it.

Mr. Zechiel: Let him proceed and I will object when I do not want any further on that line.

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The Witness: In order to keep up with the procession of the increased number of automobiles it was necessary to provide a number of additional equipments, and where the customer could not afford to pay for them and install them, it was a benefit to the trade to put them in for them under a lease arrangement.

Mr. Zechiel: You have not answered my question. Read it to him.

(Question read.)

Mr. Holliday: I submit, Mr. Examiner, he has answered that question.

789

Mr. Zechiel: I will leave it to the Examiner. I cannot do otherwise.

Examiner McCorkle: Let him answer that question.

(Question read.)

A. Both.

Q. Has the installation always been a lease and loan proposition? A. No.

Q. So that the lease and loan proposition was only a cause of the benefit where it was taken in connection with the actual installation; is that true? A.

790 *B. A. Mathews, Cross*

That question is too academic for me. Read it and see if I understand it.

Mr. Zechiel: My questions are all academic, don't worry about that.

(Question read.)

A. The lease was only the cause of the benefit where it was taken in connection with the actual installation? Yes. I would say, yes.

Q. How much experience have you had in the oil industry generally territorially? A. I have been in
791 charge of the general business of central and southern Ohio for twenty-five years.

Q. You have had no experience outside the State of Ohio? A. No, sir, not within the last twenty-five years.

Q. Did you have prior to that time? A. Somewhat, yes.

Q. You are not acquainted with conditions in the vending of gasoline in any other state than in Ohio? A. No, sir.

Q. Are you acquainted with the conditions of the vending of gasoline in the northern part of the State of Ohio? A. Just in a general way as I come in con-
792 tact with it on account of my position as director. I do not have the general management.

Q. Now, can you be a little more specific about that expression "In a general way" for my own information? With what particularity would that be. Examples would do me very well. A. Under the general duties of a director, he has to be familiar with the general conditions of any business.

Q. You mean you are acquained with the actual installations in the northern part of the state and lease and loans? A. Not the details. I could not tell you who has got a pump and who has not.

Q. Do you know whether most of them have leased or loaned pumps or own their own; are you acquainted with that end of it? A. My knowledge comes from reports of salesmen and sub-agent and district managers.

Q. Then you have been a district manager in the northern portion? A. No; I am district manager of the central and southern portions, but I get my information from the department heads.

Q. I am asking though particularly with respect to the northern portion of Ohio. A. I get that from the department manager up there. 794

Q. And from them you have learned as to the conditions with respect to leasing and loaning of pumps generally in that section? A. Generally, yes, sir.

Q. But your immediate observation and immediate experience is in central and southern Ohio? A. Yes, sir.

Q. By that you mean south of Columbus? A. South of Delaware.

Q. Delaware is a county or town? A. Delaware, Ohio.

Mr. Rubrecht: Twenty-five miles north of here.

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The Witness: Twenty-five miles north of here.

Q. When did the practice of leasing and loaning of oil tanks and pumps begin? A. In the years 1913 and '14.

Q. Did your company start that practice? A. Not until 1915.

Q. What was the occasion of your company starting the practice? A. We had to follow the example of our competitors.

Q. You would not have introduced this system on

796 *B. A. Mathews, Cross*

your own experience and observation would you? A. I cannot say as to that.

Q. What do you think now you would have done in that respect from your experience? A. Why, I have no thought on the subject because I have no data to base an opinion on.

Q. You have no idea then whether or not your company would have started this kind of practice? A. I have no way of even guessing at it.

Q. But at the time you only did it because your competitors did it? A. That is why we started it.

797 Q. Prior to that time what had been the practice? A. You mean our practice?

Q. Yes.

Mr. Rubrecht: **He has answered that.**

Mr. Zechiel: I know, but I forget.

A. That is a pretty general question. What our practice was in what respect?

Q. With respect to filling stations and your distribution of gasoline. A. We sold direct to the dealers whether they had pumps and tanks or not.

Q. Did you supply any pumps or tanks up to that time? A. Sure.

798 Q. You sold them how? A. We did not sell tanks but we sold gasoline to dealers who owned tanks.

Q. I am getting at that one fact. You did not deal in oil tanks or pumps at all prior to the time you began leasing them? A. Not to the best of my recollection. I do not remember that we did at that time.

Q. What is your best estimate as to the comparative number of oil tanks and pumps. A. Just let me correct that answer. I recall now that we did sell a few tanks and pumps.

Q. What in your best judgment was the comparative number of oil tanks and pumps in existence at

the time you began the practice of leasing and loaning oil tanks and pumps as compared with today? A. You mean the—let me see if I have any data that I can refresh my memory on that.

(Question read.)

A. It would be a mere guess. I have no data. I would say that there are three times as many now.

Q. At that time they were practically all owned by the private individuals, were they? A. Previous to 1913, when the competitors started to put them in. 800

Q. All right; let's get that period. When your competitors started to put in oil tanks and pumps, what per cent of the present installation had been installed? A. That is what I referred to when I said that I thought that probably three times as many are installed now as during 1913, when they started to put them in.

Q. Now, going back to my question—

Mr. Zechiel: Read it.

(Previous question read as follows):

"Q. At that time they were practically all owned by private individuals, were they?" A. Yes; previous to the starting of the installation of the leased outfits. 801

Q. That is what I am getting at. What per cent do you think of the installations since that time could have been sold to the various retailers of gasoline if you had never practiced leasing and loaning those equipments? A. I would say that the leasing of equipment increased the installations 25 per cent. In other words that there are 25 per cent more installations than there would have been had the leasing proposition not started. Possibly more than that. I think that is conservative.

802 *B. A. Mathews, Cross*

Q. When you testified on direct-examination that four or five years ago the conditions of marketing gasoline were all crude, you were not referring to whatever oil tanks and pumps had been installed at that time, were you? A. Not to the same equipment that we are now using, not to the curb pump and underground tank.

Q. And at that time about a third of the total installations had been made, the total present installations? A. At that time?

Q. Yes. A. I do not know that I made that state-
803 ment, did I, or else I do not understand your question. You mean one-third as many installations in 1914 as in 1919.

Q. Yes. A. It is a mere guess is all. I have no data.

Q. That is about right, isn't it? A. I guess it is.

Q. Now, you say the lease plan was a necessity because of the lack of distributing facilities; is that correct? A. I said that it helped us to keep pace with the rapid pace in automobiles by providing more installations that could not have been provided in case they had to buy them. In other words, the dealer could not afford to buy them in many cases.

804 Q. Did you ever try to sell outright these oil tanks and pumps during the time you were leasing and loaning them? A. Yes, we sell them when they will buy them.

Q. Did you ever have anybody refuse to buy one because as he stated his competitor of yours would install one for nothing? A. Yes; we have had them refuse to buy them and have had them refuse to lease from us because a competitor offered to put in an installation.

Q. Now, do I understand you to say that you think there would be some very bad results coming

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from an order of the Commission to cease and desist the practice of leasing and loaning oil tanks and pumps for a nominal consideration under tying contracts? What were those bad results? A. Well, it is the agency plan which some of our operating members—

Q. (Interposing.) What makes you think they would go into the agency plan? A. Because they would resort to some plan to secure trade and to provide proper facilities for people to market gasoline. They would either take the agency plan or some other plan which might be objectionable. They would resort to some subterfuge.

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Q. Why don't you think they would sell pumps and make a profit out of it? A. Because a number of the small dealers cannot afford to pay for them.

Q. As I understand you you think it is the duty of the oil companies to underwrite small retailers? A. It is not their duty but it is a profitable investment.

Q. Suppose the Commission were to limit its order to only such installations as were necessary because it was impossible for the small retailers to buy; what objection then would there be to that kind of an order? A. That would lead to all kinds of confusion.

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Judge Chamberlin: Nobody would be able to install them.

Mr. Rubrecht: Everybody would have to have an installation made for him.

Mr. Myers: How would you tell whether a man was able?

Mr. Zechiel: The trouble is I have received so many answers that I don't know what the witness said.

Q. Mr. Milliron, did you ever sell in larger quan-

Q. It would not be impossible to make that kind of an order? It would not be an impossible situation?

808 *B. A. Matheres, Cross*

A. Yes, I think it would be impossible to prove as to whether a dealer was capable of buying a pump.

Q. So that you think the natural result of retaining the system at all is that you must lease and loan to anybody whatsoever at your discretion? A. As long as the leasing system is used then if you are leasing to one party you have to treat the other dealers alike and if you want them you have to put them in.

Q. What objection would you have to limiting this business to whatever pumps could be sold outright
809 and to service stations? A. Well, in certain localities service stations are impracticable because they cost too much money. They would not pay. Now, in the larger cities the service station is all right. We could practically take care of the situation if there were no curb pumps either leased or sold and I think some cities—in fact I understand Cincinnati has a city ordinance now that prohibits the installation of curb outfits within the inner fire limits and in that case it drives them to the service station.

Q. Do you think that that is a general tendency throughout the whole state? A. I do not know whether you can apply the word "tendency." I am
810 just giving you one instance.

Q. I am just asking you for your opinion. A. I don't know. I have not heard of it any place else.

Q. Well, go on. I interrupted you. A. I think I am through.

Q. I think I interrupted you in answer to my question as to what objection you would have to retaining only such curb pumps as the retailers would buy outright and service stations. A. Well, the objection is as I state, that there are a number of locations where it would not pay to put in service stations and in that case the curb pump is the only thing that will

take care of the situation and a number of dealers cannot afford to buy them.

Q. Do you think that those dealers who cannot afford to buy them must have pumps in order to distribute the gasoline? A. In order to make it a convenient distributing place for automobile owners, filling place for automobile owners, it is necessary to have them widely distributed.

Q. Do you think there is an over distribution of gasoline pumps compared with the requirements of the trade? A. I think not, not when you consider the enormous increase in registration I do not think 812
there are enough now to take care of another year's increase.

Q. Isn't it a fact that there are frequently a half a dozen service stations and pumps and tanks within one block of each other? A. That is true as to any business. Sometimes they get too close together.

Q. It may be, but I am particularly anxious about this business. A. I think in some localities there are too many service stations. In some localities there are too many pumps, but those are stations.

Q. Then you think there are a great many cases where the service stations are undoubtedly plentiful? A. I think so in certain localities. 813

Q. By service stations I am including curbstone pumps. I mean service in the broader sense. A. Such conditions are exceptional.

Q. But that is true? A. In a few places, yes, they are congested. I can give you—

Q. (Interposing.) Comparing city traffic and travel with rural traffic and travel what can you say about the distribution of filling stations and curbstone pumps as to frequency in a general way? A. Filling stations are all right for congested localities in the city.

814 *B. A. Mathews, Cross*

Mr. Zechiel: I may have said—well I don't know what I said. Read the question.

(Question read.)

A. You mean are there too many or too few?

Q. No, I just want to know how they are, the fact about it. A. That is how they are; that is how many there are.

Q. Yes; how many per block or per mile. A. There is absolutely no rule. It depends altogether on the number of automobiles owned in the locality. There are certain parts of this state that are so hilly
815 and have so many unimproved roads that there are very few automobiles. Now, for instance, between here and Newark there is a pump out towards the edge of town and there is one half way to Newark and then there are pumps at Newark. Those pumps take care of the situation at the present time. Each locality has its own answer.

Q. Isn't it a fact that there are a far less number of pumps and other facilities for securing gasoline in the rural territories than in the cities? A. Less on account of a less number of automobiles. You mean less in proportion to the number of automobiles?

Q. I just mean as a fact; isn't it so? A. Less curb
816 pumps? What is the question?

(Previous question read as follows):

"Q. Isn't it a fact that there are a far less number of pumps and other facilities for securing gasoline in the rural territories than in the cites?" A. Yes.

Q. I think you testified that frequency in distribution of pumps and tanks was an essential convenience to the public. A. Yes; in localities where automobiles are pretty generally owned.

Q. Yes; in the general localities as we know them in this part of Ohio. A. Yes, sir.

Q. Is there any reason why they should be more frequent per mile in the city than in the country? A. Yes.

Q. What is it? A. Because there are more automobiles owned per mile in the city than in the country.

Q. Does that have anything to do with the frequency of obtaining gasoline? A. Yes.

Q. What is the relation there? A. Well, the man in the country, the farmer is willing to drive a mile or two, but the man in the city when he runs out of 818
gasoline wants it within the next square or two.

Q. No difference except psychology? A. No; if you own an automobile it is one of expediency.

Q. It is just as expedient in the country as in the city, isn't it? It always has been with me. It is just as expedient, isn't it? A. If you run out the nearer it is the better you are satisfied.

Q. Therefore, the same rule applies to the rural territory and the city as far as frequency is concerned. I should think so.

Q. Do you believe that from an advertising point of view the leasing and loaning of oil tanks and pumps is a necessity? A. Oh, it is not a necessity, but it is 819
a paying investment.

Q. Would it be possible to advertise through garages who do not lease or loan pumps, but who own their own? A. Not so as to identify our product.

Q. Have you any such identification on any pumps to which you sell gasoline where you do not own the equipment? A. There are a few.

Q. That is a practice, isn't it? A. Not general.

Q. When you testified with respect to the increase of storage capacity due to the introduction of leased oil tanks and pumps you were referring to the fact

that there was with each lease an actual installation of an oil tank and pump rather than the fact that it was a leased pump? A. When we lease an installation we see to it that there is as large a tank as the situation warrants put in so as to make less frequent deliveries.

Q. Has it been your experience that there has been less wisdom displayed along that line by pump dealers who installed pumps than the oil companies who leased pumps? A. They are not interested in the economical delivery of gasoline. They are interested
821 in the sale of the tank and pump.

(Question read.)

A. I would answer yes.

Q. There has been; you say there has been? A. There has been less wisdom on the part of the pump manufacturers than on the part of the oil companies.

Q. Less wisdom on the part of the retailer who installs the pump or who owns his own pump? A. Yes.

Q. How about the territories out in the rural communities; what would be the effect of this order to cease and desist as you understand on the distribution
822 of gasoline in the rural communities? A. Well, the same situation would apply in the rural communities where there are good roads as would apply in the cities. In the rural communities where they have bad roads and hilly conditions, where there are few automobiles, I do not think it would make any difference.

Q. Why is that true? A. Because there are so few automobiles owned in certain districts that there is not much gasoline sold.

Q. And, therefore, they can afford to buy their own pumps and tanks? A. No; there are very few

who can afford to buy their own pumps and tanks in that locality.

Q. Isn't it a fact that those that are there are owned by the retailers? A. Not, altogether, no.

Q. What is your experience along that line? A. Well, I should say we sell as large a percentage to dealers in the rural districts as we do in the cities.

Q. Sell or lease and loan? A. I mean lease.

Q. Do you mean to say that the leases and loans in all rural territory are the same percent of the total installations as they are in the cities? A. That is a mere guess. I have no data.

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Q. I know but you are acquainted with all this in southern Ohio? A. My general information. From my general knowledge I would have guessed that that would be true.

Q. That is true all over southern Ohio? A. Yes.

Q. If it is a fact and you knew it to be a fact that in certain portions of southern Ohio practically all the pumps are owned by the garage people, would the knowledge of that fact change your answer with respect to the effect of this proposed order to cease and desist? A. No.

Q. I believe you testified that this practice is of particular benefit to small companies and newly organized companies, is that true? A. Yes, sir. 825

Q. That is not your reason for not wanting to discontinue the practice? A. Well, I should say not. We do not usually, necessarily want to do the things that benefit the small company.

Q. You admit it to be a fact? A. Yes.

Q. It is your opinion that in the days when the garage people owned their own oil tanks and pumps there was no greater change in customers among the various oil companies who were competing for that business than there is today under the tank lease and loan system? A. I believe that.

826 *B. A. Mathews, Cross*

Q. From the point of view of the small dealer is there any benefit to him from the lease and loan practice so far as the mixing of gasolines is concerned A. Yes, I think so. I think it is a benefit to him to keep his gasoline separate and put a trade-mark on it.

Q. Is that a practical effect? A. I think so in case his agreement provides that no other gasoline goes through that pump.

Q. Suppose he does not enforce the agreement? A. That is up to him. Then he gets no benefit.

827 Q. What is your experience? Do they enforce that agreement generally or not? A. I do not know about other companies. We do.

Q. If retailers of gasoline to whom you have leased and loaned oil tanks and pumps used competitor's gasoline through those pumps, do you remove the oil tank and pump? A. We would remove the oil tank or pump or we would remove the sign, the trade-mark; that is, if they put other gasoline into the same tank. Now, some of the dealers buy from our competitors and put it into another tank. That we are not interested in.

Q. Couldn't you use that same policy of removing
828 your sign with respect to any other dealer who owned his own pump? A. If he owns his own pump he does as he pleases and you cannot put on a sign or take it off.

Q. Could you refuse to sell to him if he did not? A. If he has no sign, if he has no trade-mark on his tank we do not care whether he puts in other gasoline or not as long as he does not sell it under our brand.

Q. If you wanted to advertise through a retailer, who owned his own pump, you could require him to put a globe there, couldn't you, if he wanted to buy from you? A. No; if he owned his tank and pump.

Q. Isn't it a fact that you could— A. (Interrupting.) We might lease the privilege.

Q. Isn't it a fact that you could refuse to sell him if he did not put a globe up there showing that he was selling your gasoline? A. We could.

Q. Sure; but you would sell to anybody so long as there was no sign up, no matter how much he mixed the gasoline? A. Yes.

Q. And you do do that? A. Yes.

Q. Do you think there is going to be an increase in the number of service stations owned and operated by oil companies? A. I think so. 830

Q. To what extent do you think there will be that increase? A. Well, they will increase as fast as the necessities of the trade demand. In these larger cities especially as the business increases it goes beyond even the curb pump and then the only convenient method is a service station.

Q. Do you think that practically all the business in the large cities will be done in the future— A. (Interrup$ing.) Only in congested districts. In the suburbs it is more like a country town.

Q. There they will use curbstone pumps? A. Yes, sir.

Q. Would that be true if they had to buy their 831
curbstone pumps? A. Sure.

Q. Then regardless of what the Commission do with respect to this order the larger cities will install service stations anyway, won't they? A. In congested districts that is the only way they can supply the trade.

RE-DIRECT EXAMINATION by Mr. Holliday:

Q. Mr. Matthews, as a matter of fact do the retailers who own their own pumps put somebody else's

trade-mark and globe on that pump? A. Not as a rule.

Q. Does your company sell pumps on condition that the owner shall keep your trade-marked globe on the pump? A. No, sir.

Q. In what year would you say occurred the greatest increase in the installation of curb pumps? A. I would say 1917.

Q. How many more pumps and outfits, curb outfits would you say are being used today than in 1913 and '14? A. Why, I have no data on that subject;

833 I would say two or three times as many.

Q. I will ask you whether or not in your judgment, when the installation of curb outfits began to be leased by the oil companies, generally there would have been such a rapid increase in the number of pumps and outfits installed if it had not been for the device of loaning and leasing? A. There would not have been as many.

Q. In that early period could you give an estimate as to what extent the system of loaning and leasing contributed to the meeting the demands of the automobile? A. I do not know as I could.

(Question read.)

834

A. In 1915?

Q. Yes. A. Why, I think it met the demands and practically kept pace with the demands.

Q. I will ask you whether in your judgment it would have met the demands in that way if the installation under this leasing and loaning system had not been devised? A. I think not for the reason that the small dealer could not afford to install the outfit.

RE-CROSS EXAMINATION by Mr. Zechiel:

Q. In your experience where was the first leasing and loaning done? In the large cities or in the rural territory? A. Let's see if I can refresh my memory on that. I can give you the cities where it first started.

Q. Started in the cities then? A. Yes, sir.

Q. That is what I wanted to know.

Mr. Holliday: I think you better name the cities and give the size of them.

Mr. Zechiel: You can ask him that.

Mr. Holliday: No; I am asking him now. 836
Isn't that right?

Mr. Zechiel: No; I am busy.

Q. What size cities were those in population? A. From twenty-five thousand to eight hundred thousand.

Q. What has been the comparative installation under lease contracts in cities with respect to rural districts? A. I think the percentage would be about the same unless it would be in the hilly country and where there are rough roads and few automobiles owned.

Q. Why not there? A. Well, there are a great many people in southeastern Ohio who are a good 837
deal like the Kentucky hill people. They are not up to date.

Q. Would not installations under leases and loans put them up to date? A. You have to educate them before they will come up to date.

Q. But, now, it is a fact that they are not leased and loaned in those territories, isn't it? A. Well, there are a very few owned.

Q. And those are not highly competitive areas, are they? A. Well, they are very competive if not highly.

Q. Are they as highly competitive as the cities where

these very many lease and loan installations are made? A. I should say not.

Q. Isn't it a fact then that leases and loans have developed in the very highly competitive areas? A. I think it is more prevalent in those areas, but the highly competitive areas in Ohio cover very nearly every square foot of ground in Ohio.

Q. You do not have any highly competitive and no low competitive areas then? A. We have no low competitive condition except those possibly in the hills.

Q. Is it also true that in all places except in those
839 low competitive areas you have leases and loans in great frequency as compared with the other territory? A. You do not mean in low competitive—oh, yes, I see what you mean. Yes.

Q. Isn't it your real judgment that a very large part of this leasing and loaning practice has been a result of competition? A. One of the results.

Q. Isn't it your judgment that the reason for lease and loaning was in order to get business rather than as an accommodation to the people in the distribution of gasoline? A. I should say it was done for both reasons.

Q. You had something to do with the management
840 of your company, didn't you? A. What is that?

Q. You had something to do with the management of your company, didn't you? A. I did.

Q. What was your reason? A. Reasons for installing outfits?

Q. Your reason for favoring this lease and loan game. A. It was for the purpose of providing adequate equipment to supply a suddenly increasing trade and for the purpose of meeting competitive conditions.

Q. It was for that then? A. Yes, sir.

Q. Then whether your competitors had done it or not you would have done it? A. I don't know.

Q. It follows, doesn't it, that you did it because you wanted to supply sufficient and adequate distribution facilities; that is one of your reasons, isn't it? A. Yes.

Q. Do you think that that would not have been motive enough to have caused you to do so if there had been no competition along that line? A. I think it would have been motive enough. I think one of the policies of our company and it is with some others, is to keep pace with the demand.

Q. It is a fact that your company would have installed these leases and loans of pumps whether your 842
competitors had or not? A. I cannot say as to that. That condition never arose. It has never been studied and decided.

RE-DIRECT EXAMINATION by Mr. Holliday:

Q. What effect, if any, has this leasing and loaning system had upon new concerns going into the wholesale and jobbing business? A. It has enabled them to establish their business very much more quickly than under the old plan.

Q. Has the effect been pretty extensive? A. Yes.

Q. There have been a good many new companies 843
gone into business as a result? A. A number of them.

Q. Now, in this hill country that you are speaking about to Mr. Zechiel; how large a proportion of the gasoline is handled there in these modern underground tanks with pumps, as compared to the old-fashioned method that you described? A. I should say in that hilly country there would be a very small percentage of the gasoline handled in the modern pump. I would say not to exceed 25 per cent—I do not believe in the hilly country it would exceed 10 per cent of the business handled in the modern pump either leased or owned.

844 *B. A. Mathews, Re-direct*

Q. How many members are there of the Board of Directors of your company? A. Five.

Q. Do you mean then when you say that you cannot tell what your company would do, that what that company would do would depend upon the action of the entire Board of Directors? A. Yes, sir.

RE-CROSS EXAMINATION by Mr. Zechiel.

Q. This hilly country—do you mean in all the low competitive area that not more than 10 per cent of
845 the sale of gasoline is through gasoline curb pumps? A. I would make that estimate in the hilly, sparsely settled section of Ohio—southeastern Ohio.

Q. I prefer that old term, that low competitive area that you testified to awhile ago. Now, think of that term— A. (Interrupting.) I have no data, that is merely a guess.

Q. Would you think that the 10 per cent applies to all that low competitive area? A. I would think so.

Q. Now, you testified that it was your impression that new companies can start in more readily under the lease and loan proposition than they used to in the old form? A. Yes.

846 Q. Upon what do you base that opinion? A. For the reason that if they cannot sell to the dealer who is now doing business they can establish new dealers. They can take store keepers or garage owners who have not been selling gasoline and persuade them to put in a leased pump where they could not sell them and in that way it gives them distributing points that they could not get in other ways.

Q. How many new companies were formed, in your experience, just prior to this leasing and loaning plan? A. Why I have not—

Q. (Interrupting.) Strike the question out. What per cent of the companies existing in Ohio today were either in existence prior to this time or are now a part of a corporation which was in existence prior to the time when leasing and loaning of pumps came into use? A. Well, it would only be an estimate. Seventy-five per cent.

Q. Then seventy-five per cent of the companies started under hard times and twenty-five started under these easy lease and loan periods; that is correct? A. That is my estimate. 848

R. E. GOODWIN was thereupon called as a witness and being duly sworn testified as follows:

Direct-examination by Mr. Taber:

Q. Mr. Goodwin, where do you live? A. Toledo.

Q. What is your present business? A. I am with The Paragon Refining Company.

Q. In what capacity are you with that company? A. I have the general distribution of the product after it is finished.

Q. How long have you been in that capacity? A. 849
Fourteen years.

Q. Fourteen years? A. Yes, sir.

Q. Have you observed the general conditions of the marketing of gasoline in that vicinity? A. In a general way, yes.

Q. You have heard the testimony in chief of Mr. Matthews who was on the stand? A. Yes.

Q. You may state whether or not you find the situation in the same condition or practically so from an economic standpoint that he has related here this afternoon. A. Well, they are practically the same in

850 *R. E. Goodwin, Cross*

our business with the exception of one statement which Mr. Matthews had to make as I understood him that since 1913 he stated that the number of increased pumps and tanks had been three times. My estimate, and it is only an estimate, gathered from information that I receive from our salesmen and the general trade is that it is perhaps increased from ten to fifteen times. In 1913 the pumps were all owned.

Q. When did the leasing of pumps begin in that territory? A. About 1913 or 1914. I am not quite sure.

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CROSS-EXAMINATION by Mr. Zechiel:

Q. What is your territory, Mr. Goodwin? A. Ohio.

Q. All over Ohio? A. Well, not all over Ohio but we meet—we run into conditions that exist largely throughout the state.

Q. You agree with Mr. Goodwin's testimony? A. Mr. Matthews.

Q. Yes; I beg your pardon. A. Yes, sir.

Q. With the reservation you have made? A. Yes, sir.

852 Q. That is both on direct-examination and cross-examination? A. Yes; I would say that it is substantially correct.

Q. You are going to agree with it now or not? A. Yes, I think I will.

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C. E. LAUBACH, was thereupon called as a witness and being first duly sworn testified as follows:

Direct-examination by Mr. Rubrecht:

Q. Mr. Laubach, with what company are you interested? A. The Columbus Oil Company.

Q. How many years have you had of experience in handling petroleum products, gasoline and oil? A. Between nine and ten years.

Q. What position do you occupy with the Columbus Oil Company? A. Vice president and general manager.

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Q. What territory does your company cover in Ohio? A. We cover the Counties of Marion, Miami, Fayette, Greene, Warren, Pickaway, Ross and Fairfield.

Q. How many years has your company been in operation in Ohio? A. Well, the company has been as a corporation since 1914, May, 1914. Prior to that we operated as a partnership.

Q. And prior to that you operated as a partnership for how many years? A. We have operated in Ohio for eight and one-half years.

Q. Eight and one-half years? A. Yes, sir.

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Q. In both conditions, either in the partnership or under the corporation, were you actively engaged in the marketing of the production? A. Yes, sir.

Q. Oil and gas? A. Yes, sir.

Q. You are familiar then with the custom of handling the products in the territory as to which you have testified? A. Yes, sir.

Q. Now, Mr. Laubach, have you been present all the time and heard the testimony of Mr. B. A. Matthews of the Standard Oil? A. Yes, sir.

Q. Both on chief and on cross-examination? A. Yes, sir.

856 *C. E. Laubach, Direct*

Q. I will ask you to state whether or not your experience and your knowledge would permit you to give the same testimony substantially as he has given? A. Why, I would make the exception that Mr. Goodwin made in reference to the increased number of pumps. I do not know as I would quite agree with Mr. Goodwin. In our territory I do not believe they have increased ten or fifteen times but I would say eight to ten times.

No cross-examination.

857 Mr. Holiday: Mr. Examiner, the Standard Oil Company offers as a part of this case the testimony of the last two witnesses, R. E. Goodwin and C. E. Laubach, and asks that their testimony be included in and treated as a part of the record in the case against the Standard Oil Company.

Mr. Taber: And in regard to the Paragon Refining Company we want to introduce the testimony of B. A. Matthews and C. E. Laubach as part of our case.

Mr. Myers: On behalf of the Ohio Cities Gas Company we wish to introduce the testimony of B. A. Matthews, R. E. Goodwin and C. E. Laubach.

858 Judge Chamberlin: With reference to the Canfield Oil Company, Docket No. 323, we will adopt the testimony of the last three witnesses, B. A. Matthews, R. E. Goodwin and C. E. Laubach as part of the record.

Mr. Rubrecht: We desire on behalf of the Columbus Oil Company to do the same thing, Docket No. 321.

Mr. Taber: I will take the liberty in the absence of Mr. Lippincott to have the testimony of these three witnesses introduced as a part of the testimony in the case of the Lily White Oil Company.

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Briefs and Arguments.

Mr. Myers: We desire on behalf of the Ohio Cities Gas Company to present written briefs and oral arguments.

Mr. Rubrecht: We desire to make the same request on behalf of the Columbus Oil Company.

Mr. Holiday: The same request by the Standard Oil Company of Ohio may be noted.

Judge Chamberlin: Let the record show the same request on behalf of the Canfield Oil Company.

Mr. Taber: And the same request for arguments and briefs on behalf of the Paragon Oil Company 860
and The Lily White Oil Company.

Mr. Zechiel: It is agreed that the time for filing such briefs as may be filed by respondents shall be thirty days after the taking of the deposition of Mr. MacEwen in Cleveland or after the notice to respondents that such deposition will not be taken, and in case the briefs are to be printed, ten days in addition will be allowed for the printing of the briefs.

Examiner McCorkle: The record will show the request for oral argument and the time for the filing of the briefs.

Whereupon at 6 o'clock P. M., October 30, 1919, the hearing of the above-entitled matters was closed. 861

862 BEFORE THE FEDERAL TRADE COMMISSION.

FEDERAL TRADE COMMISSION, Complainant, vs. THOMAS K. BRUSHART, *et al.*, Respondents.	Docket Nos. 305, 308, 317, 318, 319, 321, 322, 323, 324, 326, 327, 329 (Consolidated).

863 Cleveland, Ohio, November 7, 1919, 2 P. M.

Before: George McCorkle, Examiner.

Met pursuant to notice.

Appearances:

Chester L. Zechiel, Washington, D. C., appearing for the Federal Trade Commission.

Charles M. Buss, of Kline, Neiman, Buss & Moser, 110 East Ohio Gas Building, Cleveland, Ohio, appearing for the Standard Oil Company of Ohio.

864 Mr. Zechiel: Referring to the agreement and understanding of the hearing in Columbus, I want to call as a witness for the Commission Mr. McEwen, to testify on behalf of the Commission in the cases of the Federal Trade Commission versus Thomas K. Brushart, trading under the firm style and name of the Motor Fuel & Lubricating Company, the Ohio Cities Gas Company, the White Star Oil Company, the Paragon Refining Company, the Hickok Producing Company, the Columbus Oil Company, the Carbonless Oil Company, the Canfield Oil Company, the Factory Oil Company, the Independent Distributing

Company, the Lily White Oil Company, Incorporated, the Springfield Oil Products Company, Incorporated, the Lubric Oil Company, Refining Oil Company, Standard Oil Company of Ohio.

W. E. MACEWEN, was thereupon called as a witness, and having been duly sworn, testified as follows:

Mr. Zechiel: In order to make the record complete, I think it might be well understood that any objections made or any evidence taken on cross-examination will accrue to the benefit of all the companies. 866

Mr. Buss: Yes.

Examiner McCorkle: Yes.

Mr. Zechiel: I presume they are looking to you, Mr. Buss.

Mr. Buss: I just heard of this about an hour ago and do not know what notice the others may have had.

Mr. Zechiel: I sent notice to all the attorneys who requested it at the time of our adjournment.

Direct-examination by Mr. Zechiel: 867

Q. With what company are you associated? A. The National Refining Company.

Q. In what capacity? A. Secretary.

Q. What is the territorial extent generally of the National Refining Company's business? A. Our market is of petroleum and its products. Do you want me to enumerate the states?

Q. No, I think if you just give them generally it will be sufficient. A. A territory stretching from Ohio through to Oklahoma, Kansas and Nebraska—

Q. Is that including those states or excluding them? A. Including them, and south into the States of Tennessee and Arkansas.

Q. Do you do business from there north to the United States boundary line? A. Well, to the Ohio boundary line so far as eastern territory is concerned, we do not go east of the Ohio-Pennsylvania line.

Q. And the business that you are engaged in generally? A. We are engaged in producing, refining and marketing of petroleum and its products.

Q. In the course of your business in the State of
369 Ohio, do you send gasoline products and others of your products from one state into Ohio or from Ohio into other states? A. Yes, sir.

Q. In connection with your business as a distributor of gasoline do you also deal in oil tanks and pumps used in connection with the sale or distribution of that product? A. Only to the extent of utilizing them in our own business.

Q. You do not sell or lease or loan them? A. No, sir. I will qualify that by saying we have some few arrangements put in some years ago, but for the last several years we have not engaged in the practice at all, with the exception of two or three cases that I
370 recently entered into in order to save some of our business from another concern that was going to put in equipment.

Q. We will come to those exceptions a little later on. You are acquainted with the general practice of what is known as leasing and loaning of oil tanks and pumps for a nominal consideration? A. Yes, sir.

Q. In the course of your business have you had occasion to come in contact with the distributing and retail centers throughout the territory? A. Yes.

Q. What has been your experience, do retailers of gasoline products generally have installed on their

premises more than one oil tank and pump equipment used in the distribution of gasoline products? A. They generally do not have more than one.

Q. In those cases where they have more than one do they handle the products of competing companies or of one company? A. They usually handle the products of one company. You will find exceptions to that, but they are rather exceptions than the rule.

Q. And that is true in Ohio as well as the other states? A. Yes, sir.

Q. In the course of the business of your company have you ever lost customers or prospective customers, 872
they giving as their reason that they were under contract obligations to use through oil tanks and pumps on their premises the gasoline products only of competitors? A. Will you give me that question again?

Q. (The question was then read as above recorded.) A. We have failed to secure business by reason of such conditions and we have lost business by reason of failing to furnish this equipment where our competitors would furnish it.

Q. To what extent has that been true in your experience in your company? A. We continuously receive complaints from our salesmen that they are unable to secure a greater proportion of the dealers' busi- 873
ness by reason of our policy in not furnishing this equipment.

Q. Is that true in the State of Ohio? A. Yes, sir.

Q. Are the respondents whom I have enumerated here all competitors of yours in the State of Ohio, if you remember the list of respondents? Just take a look at them there (handing paper). A. Most of them are. Some of these companies are rather local companies where we might not be distributing. I would not want to go on record as saying that they all are. The Ohio Cities Gas Company—

Q. Is or is not? A. Is. The White Star Oil Company, Paragon Refining Company, Canfield Oil Company and the Lubric Oil Company and the Standard Oil Company are competitors and the others may be.

Q. When you testified that you had lost customers and prospective business because of this practice of leasing and loaning pumps, were you referring to the loss of business to any of these competitors? A. Yes. The St. Clair Refining Company are not mentioned there, are they?

875 Q. No, and they are not respondents in this case. Would you say that it was true of each of the respondents that are parties to the proceeding here? A. I would say that the general practice, yes, I can specifically state at this time the particular cases where each one would be involved.

Q. But it is your best judgment that the same thing has happened with respect to all these respondents? A. Yes, I would say so.

Q. In your competitive territory? A. Yes.

Q. Would you say that the practice of leasing and loaning pumps for a nominal consideration under these tying agreements or arrangements in the Ohio

876 territory is a desirable practice from the point of view of competition? A. No, I think it is a very undesirable practice and mighty poor merchandising.

Q. What is your reason for your answer, or reasons, just as detailed or elaborate as you please? A. I think whenever you give anything away for nothing somebody pays for it. You are opening the door that to my mind, if it would be approved by the Commission, might lead to even a more extensive practice, as I stated at Washington. We have applications here for trucks. People will go out and solicit and sell oil for us if we will furnish them a truck. And to

put in equipment that will cost seven or eight hundred dollars and expect to get a profit on all the goods to my mind is almost impossible.

Q. Do you believe that there is a call on the part of the public for a more extensive geographical distribution of oil tanks and pumps for their convenience? A. I think that is the tendency of the times, yes.

Q. Do you think that if the Commission were to order and enforce the cessation of this practice of leasing and loaning pumps under the tying contract for a nominal consideration that the result would be a dis- 878
advantage to the public from the point of view of numerical number of distribution centers of gasoline products? A. I do not, because I think the ordinary garage, if the practice was discontinued, from their own standpoint would put in that equipment just the same as they put in a vulcanizer or anything else used in a garage.

Q. How about a smaller retailer, like the groceryman in the smaller communities? A. I think he would put in the equipment necessary to distribute it, depending upon the amount he was distributing.

Q. If you know, how long has this practice been a general practice in the oil industry? A. It has been 879
a practice more or less for a good many years, but not as extensive as probably the last few years.

Q. Say the last three or four or five years? A. The last three or four years.

Q. Prior to that time what per cent of the pumps that are at the present time installed had been installed, prior to say 1914? I am not sure that that question is very clear. A. Well, I would think—you are referring to how many pumps were distributing gasoline as compared with now?

880 Q. Yes, that is the idea. A. I would say a very small percentage as compared with now. I would not be able to answer the question, but from my knowledge of the business I do not think there would be any comparison.

Q. That there are now say three or four times as many pumps? A. Today, yes.

Q. At that time the pumps that were distributed and were being used, were they largely owned by the retailers or were they under lease contracts, in 1914, say? A. So far as my knowledge goes they were
881 very largely owned by the retailers.

Q. Were those retailers in a general way the same class of retailers as retail gasoline today? A. No, they were not as substantial a class. The garage business has had an evolution and Dun and Bradstreet's rating will show that they have evolved from a very uncertain business to one that is more substantial, so that the garage business today is a substantial business.

Q. But so far as actual personnel is concerned, the pump was established and in place and in location in the same sort of garages and with the same sort of grocery men say out in the smaller territories as to-
882 day, is that true? A. No, I think that distribution has probably left the grocery to a considerable extent and gone to the garage or hardware dealer. There has been that change.

Q. What is your experience with respect to the distribution of oil tanks and pumps in the more rural territories so far as whether or not they are in those places under lease or loan contracts or owned by the dealers themselves? A. They are usually—I say usually—in some territory they are nearly all given away or leased or loaned.

Q. Are they more frequently leased or loaned in the rural communities and smaller towns than they are in the large cities, say the size of Cleveland and Columbus and Toledo? A. I think that has been true until recently and they have been going at the large cities, so I am informed by our sales force.

Q. So that it is your impression that in a general way the comparative number of lease and loan contracts in the rural territories and the more urban territories is about the same now and has been about the same for the past three or four years? A. I think it is more extensive. 884

Q. More extensive? Well, I mean the comparative number, comparing the rural territory with the urban territory, the comparative number of lease and loan equipments. A. I think they would be more.

Q. In which territory? A. Both territories.

Q. Well, I am not comparing them as to the time but as to the place, Mr. MacEwen? A. Well, I do not just get the purport of that question. I do not understand it.

Q. Let me ask it in a different way. The per cent of lease and loan equipments in the urban territories as compared with the lease and loan equipment in the rural territories is greater or less in one than in the 885 other? The per cent of the total number of such equipments that are owned privately and also under leased contracts? A. Just what do you mean by urban territory, and then I think I can answer.

Q. The larger cities of fifteen or twenty thousand and on up. A. Well, I think the growth is larger in the urban territories than it would be in what would be commonly called the rural territories.

Q. Is it your opinion or not that if the Commission should interfere with this practice and attempt to stop it that it would compel wholesalers of gasoline to sell

their products through what is commonly known as the service station owned by the oil companies? A. No.

Q. What effect do you think it would have? A. I do not think it would have any effect because of the evolution that is taking place with reference to the Standard Oil Company, as they are filling their filling stations they are discontinuing any allowance to the dealer, that is leaving the dealer open to free competition, you might say, among the independents. It is the practice of the independents as well as the
887 Standard Oil Company in most territories to give the dealer an allowance below the billing station price. That allowance in my opinion is sufficient to justify the dealer buying the equipment and also will enable the independent refinery to get the business, depending upon the salesmanship of its organization. I do not think the filling stations of the Standard Oil Company will have any effect upon us.

Q. Do you think the effect of this order if such an order were made would be to compel the gasoline trade generally to enter into what is commonly called the agency contract with respect to oil tanks and pumps? A. I do not believe I could prophesy as to
888 that.

Q. Just from your experience. Somebody has got to prophesy. These are things they are quarrelling about. A. I think there would be an attempt to do that, sure.

Q. Do you think that the pumps that are now distributed under such lease and loan agreements and those that will be distributed under one form of contract or another either by outright sale or some other plan are more likely to be distributed under agency agreement or by outright sales? A. Well, I would

say if they can get agency agreement that would not be a violation of the Federal Trade Act, they probably would be more under the agency agreement.

Mr. Zechiel: I think that is all.

CROSS-EXAMINATION by Mr. Buss:

Q. I do not know that I care to make any special inquiries except that I would like to get into the record the capitalization of the National Refining Company, Mr. MacEwen. A. The capitalization is $15,000,000, a little over ten millions of which is issued. 890

Q. And as oil producing, refining and marketing companies go, the National is one of the largest, is it not? A. Yes, we might be termed one of the largest. You might not say one of the largest when it comes to marketing through the billing station perhaps, a great many of them are more extensive than we are. Even small jobbing companies will have more billing stations than the National with its big organization.

Q. But your policy in the distribution has been to do it practically entirely through the filling station? A. No, sir; we have towns where dealers are located, where we have every dealer in town. 891

Q. Do you sell them in barrels or tank cars? A. By tank wagons.

Q. In your billing station you charge how much for your gasoline? A. Depending on the territory.

Q. How much in Ohio? A. 28 1/2 cents.

Q. And in the other states it varies? A. It would vary.

Q. Between what range? A. Well, it would probable vary 25 1/2 to 28 1/2 at the maximum. You

862 *W. E. MacEwan, Cross*

might go out into the farther northwestern territory where it might be a little higher than that, depending on the freight rates.

Q. But as a general proposition two or three cents above the usual going rate? A. What do you mean?

Q. Gasoline two or three cents in excess of the ordinary gasoline price? A. Do you mean our price is?

Q. Yes. A. Our price on White Rose gasoline is usually, generally speaking, three cents over what is commonly known as the market.

863 Mr. Buss: That is all.

By Mr. Zechiel:

Q. In that connection about what per cent of your capitalization could be said to be [illegible] in the sale and distribution of gasoline products to retailers? A. It would be very difficult for me without an analysis to say.

Q. I expect it would be, but if you can get at something close to about what would be said to be an overhead or a capital investment with respect to your distribution— A. I would make a guess and say 25 per cent. I might be off on that.

864 Q. Your guess would be better than anybody else's. A. Take our three refineries, they are worth a good portion of that capitalization.

Mr. Zechiel: That is all.

(Witness excused.)

Whereupon, at 2:50 P. M., November 7, 1919, the hearing was adjourned.

Writ of certiorari No. 637. 865

UNITED STATES OF AMERICA, ss:

President of the United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, greeting:

Being informed that there is now pending before a suit in which Standard Oil Company (New Jer-) is petitioner, and Federal Trade Commission is pondent, No. 2599, October term, 1920, which suit s removed into the said Circuit Court of Appeals virtue of a petition to review an order of the Fed- l Trade Commission, and we, being willing for cer- reasons that the said cause and the record and pro- 866 dings therein should be certified by the said Circuit rt of Appeals and removed into the Supreme Court the United States,

o hereby command you that you send without delay the said Supreme Court, as aforesaid, the record and ceedings in said cause, so that the said Supreme rt may act thereon as of right and according to law ght to be done.

Witness the Honorable William H. Taft, Chief Jus- e of the United States, the second day of December, the year of our Lord one thousand nine hundred and enty-two.

SEAL.] WM. R. STANSBURY, 867
Chief Clerk of the Supreme Court of the United States.

(Indorsed:) File No. 29,187. Supreme Court of United States, No. 637, October term, 1922. Fed- l Trade Commission vs. Standard Oil Company New Jersey). Writ of certiorari. Received Jan. 11, 23. Saunders Lewis, jr., clerk. Received Jan. 12, 23. Office of the Clerk, Supreme Court U. S.

868 *Writ of certiorari No. 637.*

In the United States Circuit Court of Appeals for the Third Circuit.

FEDERAL TRADE COMMISSION, PETITIONER,
vs.
STANDARD OIL COMPANY OF NEW JERSEY, RESPONDENT. } No. 2599.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme
869 Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Third Circuit to the writ of certiorari granted therein.

JAMES M. BECK,
Solicitor General.
CHESTER O. SWAIN,
JAMES H. HAYES,
Counsel for Respondents.

DEC. 6, 1922.

Endorsements: No. 2599. Stipulation of counsel. Received & filed Jan. 11, 1923. Saunders Lewis, jr., clerk.

870 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, Third Judicial Circuit, set.:

I, Saunders Lewis, jr., clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original stipulation of counsel as to return to writ of certiorari in the case of Federal Trade Commission, petitioner, vs. Standard Oil Company of New Jersey, respondent, No. 2599, on file, and now remaining among the records of the said court, in my office.

Writ of certiorari No. 638. 871

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 11th day of January, in the year of our Lord one thousand nine hundred and twenty-three, and of the independence of the United States the one hundred and forty-seventh.

[SEAL.] SAUNDERS LEWIS, Jr.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

(Indorsed:) File No. 29187, Supreme Court U. S., October term, 1922. Term No. 637. Federal Trade Commission, petitioner, *vs.* Standard Oil Company (New Jersey). Writ of certiorari and return. Filed 872
January 12, 1923.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Being informed that there is now pending before you a suit in which Gulf Refining Company is petitioner, and Federal Trade Commission is respondent, No. 2609, October Term, 1920, which suit was removed into the said Circuit Court of Appeals by virtue of 873
a petition to review an order of the Federal Trade Commission, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

874 *Writ of certiorari No. 638.*

Witness the Honorable William H. Taft, Chief Justice of the United States, the second day of December, in the year of our Lord one thousand nine hundred and twenty-two.

[SEAL.] WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

(Indorsed:) File No. 29188. Supreme Court of the United States, No. 638, October term, 1922. Federal Trade Commission *vs.* Gulf Refining Company. Writ of certiorari. Received January 11, 1923. Saunders Lewis, jr., clerk. Received Jan. 12, 1923, Office of the Clerk, Supreme Court, U. S.

875

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FEDERAL TRADE COMMISSION, PETITIONER,
vs.
GULF REFINING COMPANY, RESPONDENT. } No. 2609.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return
876 of the clerk of the United States Circuit Court of Appeals for the Third Circuit to the writ of certiorari granted therein.

JAMES M. BECK,
Solicitor General.
CHESTER O. SWAIN,
JAMES H. HAYES,
Counsel for Respondents.

DEC. 6, 1922.

Endorsements: No. 2609. Stipulation of counsel. Received and filed Jan. 11, 1923, Saunders Lewis, jr., clerk.

Writ of certiorari No. 639. 877

UNITED STATES OF AMERICA,

Eastern District of Pennsylvania, Third Judicial Circuit, set.:

I, Saunders Lewis, jr., clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original stipulation of counsel as to return to writ of certiorari in the case of Federal Trade Commission, petitioner, vs. Gulf Refining Company, respondent, No. 2609, on file, and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 11th day of January in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the United States the one hundred and forty-seventh. 878

[SEAL.] SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

File No. 29188. Supreme Court U. S., October term, 1922. Term No. 638. Federal Trade Commission, Petitioner, vs. Gulf Refining Co. Writ of certiorari and return. Filed Jan. 12, 1923.

UNITED STATES OF AMERICA, ss: 879

The President of the United States of America, to the honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, greeting:

Being informed that there is now pending before you a suit in which Maloney Oil and Manufacturing Company is petitioner, and Federal Trade Commission is respondent, No. 2632, which suit was removed into the said Circuit Court of Appeals by virtue of a petition to review an order of the Federal Trade Commission, and we, being willing for certain reasons that the said

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 637

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

STANDARD OIL COMPANY (NEW JERSEY),
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Volume I

(Proceedings and Appeal Papers)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. —.

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

STANDARD OIL COMPANY (NEW JERSEY),
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD DISTRICT.

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ED STATES OF AMERICA,
Before Federal Trade Commission, ss.:

FEDERAL TRADE COMMISSION
v.
NDARD OIL COMPANY (NEW JERSEY). } Docket No. 337.

CERTIFICATE.

J. P. Yoder, Secretary of the Federal Trade Commission, fy that the following is a full, true and correct transcript of ecord in the above entitled proceedings, including the pleadings, mony, exhibit, the Commission's report, findings as to the facts conclusions and orders therein; that this transcript is trans- d to the United States Circuit Court of Appeals for the Third uit pursuant to service upon the Commission of a copy of a tion for Review by Chester O. Swain and James H. Hayes, attor- for above-named respondent, on the 14th day of August, A. D.

testimony whereof, I have hereunto subscribed my name and ed the seal of the Federal Trade Commission to be affixed , at the City of Washington, in the District of Columbia, this day of October, A. D. 1920.

AL.] J. P. YODER, *Secretary.*

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

DOCKET NO. 337.

FEDERAL TRADE COMMISSION

vs.

STANDARD OIL COMPANY (NEW JERSEY), RESPONDENT.

script of the proceedings before the Federal Trade Commis- sion, certified to the United States Circuit Court of Appeals for the Third Circuit, in accordance with the provisions of Section 5 of the Act of Congress approved September 26, 1914,

entitled "An Act to create a Federal Trade Commission, ... define its powers and duties, and for other purposes," and ... Section 11 of the Act of Congress approved October 15, 19... entitled "An Act to supplement existing laws against unlaw... restraints and monopolies, and for other purposes"—as a res... of the petition filed in said Court on August 16, 1920, by ... attorneys for the Standard Oil Company (New Jersey), for ... review of the Order to Cease and Desist entered by the Fed... Trade Commission against said Standard Oil Company (Ne... Jersey) under date of April 27, 1920.

Resolution authorizing original complaint—Dated July 18, 19...

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

At a regular session of the Federal Trade Commission, held at ... office in the City of Washington, D. C., on the 18th day of J... A. D. 1919.

Present: John Franklin Fort, chairman, Victor Murdock, Hu... Thompson, William B. Colver, commissioners.

FEDERAL TRADE COMMISSION *v.* STANDARD OIL COMPANY (NEW JERSEY).	Docket No. 337. C... plaint in the matter ... the alleged violation ... Section 5 of an Act ... Congress approved S... tember 26, 1914, and ... the alleged violation ... Section 3 of the Act ... Congress approved O... tober 15, 1914.

Whereas, the Federal Trade Commission has reason to believe th... the Standard Oil Company (New Jersey) has violated and is viol... ing the provisions of Section 5 of the Federal Trade Commiss... Act, and of Section 3 of an Act of Congress approved October ... 1914; therefore be it

Resolved: That the Federal Trade Commission issue and ser... upon the said Standard Oil Company (New Jersey) its complai... stating its charges in that respect in substantially the form ... unto annexed, and be it

Further resolved: That notice be given to the said Standard ... Company (New Jersey), as required by law, that the charges of ... complaint will be heard by the Commission at its office in the C... of Washington, D. C., on the 15th day of September, 1919, at ... o'clock in the forenoon of the said day, or as soon thereafter as ... same may be reached.

Adopted by the Commission.

(Signed) J. P. YODER,
Secretary.

[SEAL.]

Original complaint—Dated July 18, 1919.

ITED STATES OF AMERICA,
Before Federal Trade Commission, ss.:

a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 18th day of July, A. D. 1919.

Present: John Franklin Fort, chairman, Victor Murdock, Huston mpson, William B. Colver, commissioners.

EDERAL TRADE COMMISSION *v.* ANDARD OIL COMPANY (NEW JERSEY).	Docket No. 337. Complaint in the matter of the alleged violation of Section 5 of the Act of Congress approved September 26, 1914, and Section 3 of the Act of Congress approved October 15, 1914.

I.

The Federal Trade Commission, having reason to believe from a liminary investigation made by it, that the Standard Oil Com- y (New Jersey), hereinafter referred to as the respondent, has using unfair methods of competition in interstate commerce, in lation of the provisions of Section 5 of the Act of Congress, roved September 26, 1914, entitled "An Act to create a Federal de Commission, to define its powers and duties, and for other poses," and it appearing that a proceeding by it in respect roof would be to the interest of the public, issues this complaint, ing its charges in that respect on information and belief as lows:

PARAGRAPH ONE: That the respondent, Standard Oil Company w Jersey), is a corporation organized, existing and doing busi- s under and by virtue of the laws of the State of New Jersey, h principal office and place of business located at the City of w York, State of New York; that for more than four years last t respondent has been engaged in the business of purchasing and ing refined oil and gasoline, and the leasing and loaning of oil ps, storage tanks or containers and their equipments, in various s of the United States and the District of Columbia in compe- on with numerous persons, firms, corporations and copartner- s similarly engaged.

PARAGRAPH TWO: That the respondent, in the conduct of its busi- s as aforesaid, and as hereinafter more particularly described, chases refined oil and gasoline, hereinafter referred to as "prod-

ucts," and also purchases oil pumps, storage tanks or containe hereinafter referred to as "devices," the said devices being used contain said products, the said products and devices then bei handled and stored in the various states of the United States a transported in interstate commerce; that the aforesaid products a sold and the aforesaid devices are leased or loaned by respondent various persons, firms, corporations and copartnerships; that in t conduct of its business of purchasing and selling such products an selling, leasing or loaning such devices, the same are constantl moved from one state to another by respondent and there is con ducted by respondent a constant current of trade in such product and devices between various states of the United States; that ther are numerous competitors of respondent who, in the conduct of thei business in competition with respondent, purchase similar product and purchase and manufacture similar devices, the said devic being used to contain said products, the said products and devic then being handled and stored in the various states of the Unite States and transported in interstate commerce; that the aforesai products are sold and the aforesaid devices sold, leased or loaned b such competitors of respondent to various persons, firms, corpora tions and copartnerships; that in the conduct of their business, a aforesaid, competitors of respondent constantly move such produc and devices from one state to another and there is conducted by sai competitors a constant current of trade in such products and devic between the various states of the United States; that respondent an many of its competitors have conducted their said businesses in a similar manner to that above described throughout the past fou years.

PARAGRAPH THREE: That respondent in the conduct of its busi ness, as aforesaid, with the effect of stifling and suppressing competi tion in the sale of the aforesaid products and in the sale, leasing o loaning of the aforesaid devices and other equipments for storin and handling the same, and with the effect of injuring competitor who sell such products and devices, has within the four years las past sold, leased or loaned and now sells, leases or loans the sai devices and their equipments for prices or considerations which d not represent reasonable returns on the investments in such devic and their equipments; that many such sales, leases or loans of th aforesaid devices are made at prices below the cost of producing an vending the same; that many of such contracts for the lease or loa of such devices and their equipments provide or are entered int with the understanding that the lessee or borrower shall not place i such devices, or use in connection with such devices and their equi ments, any refined oil or gasoline of a competitor; that only a sma proportion of the dealers in gasoline and refined oil under such agree ments and understandings deal also in similar products of respon ent's competitors and that only a small proportion of such dealer require or use more than a single pump outfit in the conduct of thei

said business: that there are numerous competitors in the sale of such products, who are unable to enter into such lease agreements or understandings because of the large amount of investment required to carry out such lease agreements as a competitive method of selling refined oil and gasoline: that there are numerous other competitors of respondent engaged in the manufacture and sale of said devices and their equipments, who do not deal in refined oil and gasoline, and therefore do not sell or lease said devices and their equipments for a nominal consideration on a condition or understanding that their products only are to be used therein: that the said numerous competitors who were unable to enter into such lease agreements or understandings, as aforesaid, have lost numerous customers in the sale of refined oil and gasoline to respondent because of the business practices of respondent hereinbefore set forth. That the said numerous other competitors of respondent who manufacture and sell said devices and their equipments, but do not sell refined oil and gasoline, as aforesaid, have lost numerous customers and prospective customers for the purchase of their devices and equipments because of the said business practices of respondent, as hereinbefore set forth.

II.

The Federal Trade Commission, having reason to believe from a preliminary investigation made by it, that the Standard Oil Company (New Jersey), hereinafter referred to as the respondent, has been using unfair methods of competition in interstate commerce, in violation of the provisions of Section 3 of the Act of Congress, approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint, stating its charges in that respect on information and belief as follows:

PARAGRAPH ONE: That the respondent, Standard Oil Company (New Jersey), is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business in the City of New York, State of New York: that for more than four years last past respondent has been engaged in the business of purchasing and selling refined oil and gasoline and the leasing of oil pumps and storage tanks and their equipments in various states of the United States and the District of Columbia, in competition with numerous firms, corporations and copartnerships similarly engaged.

PARAGRAPH TWO: That the respondent in the conduct of its business, as aforesaid, and as hereinafter more particularly described, purchases refined oil and gasoline, hereinafter referred to as "products," and also purchases oil pumps, storage tanks or containers, hereinafter referred to as "devices," the said devices being used to contain said products, the said products and devices then being handled and stored in the various states of the United States and

transported in interstate commerce. That such products are sold, and such devices sold, leased or loaned by respondent to various persons, firms, corporations and copartnerships; that in the conduct of its business of purchasing and selling such products and selling, leasing or loaning such devices, the same are constantly moved from one state to another by respondent, and there is conducted by respondent a constant current of trade in such products and devices between the various states of the United States; that there are numerous competitors of respondent who in the conduct of their businesses in competition with respondent purchase similar products and purchase and manufacture similar devices, the said devices being used to contain said products, the said products and devices then being handled and stored in the various states of the United States and transported in interstate commerce; that such products are sold and the aforesaid devices sold, leased or loaned by such competitors in competition with respondent to various persons, firms, corporations and copartnerships; that in the conduct of such business, as aforesaid, respondent's competitors constantly move such products and devices from one state to another and there is conducted by said competitors of respondent a constant current of trade in such products and devices between the various states of the United States; that respondent and many of its competitors have conducted their said businesses in a similar manner to that above described throughout the four years last past.

PARAGRAPH THREE: That the respondent, for four years last past, in the conduct of its business as aforesaid, has leased and made contracts for the lease and is now leasing and making contracts for the lease of said devices and their equipments to be used within the United States, and has fixed and is now fixing the price charged therefor on the condition, agreement or understanding that the lessees thereof shall not purchase or deal in the products of a competitor or competitors of respondent; and that the effect of such leases or contracts for lease, and conditions, agreements, or understandings, may be and is to substantially lessen competition and tend to create a monopoly in the territories and localities where such contracts are operative.

Therefore, notice is hereby given you, the said Standard Oil Company (New Jersey), that the charges of this complaint will be heard by the Federal Trade Commission at its office in the City of Washington, D. C., on the 15th day of September, A. D. 1919, at 10.30 o'clock in the forenoon on that day, or as soon thereafter as the same may be reached, at which time and place you shall have the right to appear and show cause why an order should not be entered by the Federal Trade Commission requiring you to cease and desist from the violations of law charged in this complaint.

And you will further take notice that within thirty (30) days after the service of this complaint, you are required to file with the Commission an answer in conformity with Rule III of the Rules of Practice before the Commission.

In witness whereof, the Federal Trade Commission has caused this complaint to be issued, signed by its Secretary, and its official seal to be affixed hereto at the City of Washington, D. C., this 18th day of July, A. D. 1919.

By the Commission.

[SEAL.] (Signed) J. P. YODER,
Secretary.

(Signed) CLAUDE R. PORTER,
Chief Counsel for the Commission.

Answer of respondent—Filed August 30, 1919.

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss.:

FEDERAL TRADE COMMISSION *v.* STANDARD OIL COMPANY (NEW JERSEY).	Docket No. 337.

Answer.

Standard Oil Company, respondent in the above-entitled action, answering the complaint herein, by Chester O. Swain, its attorney,

I.

As to the first alleged cause of action, said respondent denies, upon information and belief, that it is or has been using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of the Act of Congress, approved September 26, 1914, entitled "An Act to Create a Federal Trade Commission, to define its powers and duties, and for other purposes."

Further answering the first alleged cause of action in said complaint,

1. Said respondent admits that it is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with a place of business located at the City of New York, State of New York, that for more than four years last past, it has been engaged in the business of manufacturing and selling refined oil and gasoline in various states of the United States and the District of Columbia, in competition with other persons, firms, corporations and copartnerships; it admits that it has incidentally purchased refined oil and gasoline; but respondent denies, upon information and belief, that it is now or ever has been engaged in the business of leasing or loaning oil pumps, storage tanks or containers and their equipments.

2. Said respondent admits that, in the conduct of its business, it manufactures and purchases refined oil and gasoline, hereinafter referred to as "products," and that it also purchases oil pumps, storage tanks or containers, hereinafter referred to as "devices," and that it handles and stores said products and devices in various states of the United States, and that it causes to be transported in interstate commerce certain thereof; that it sells such products and leases or loans certain of such devices to various persons, firms, corporations and copartnerships; that certain of such products and devices are moved or caused to be moved from one state to another by respondent, and that respondent conducts a current of trade in the sale of such products and devices between various states of the United States; but said respondent is without knowledge as to each and every allegation set out in Paragraph "Two" of the first alleged cause of action in said complaint not hereinbefore specifically admitted or denied.

3. Said respondent admits that, in the conduct of its business within the four years last past, it has leased certain devices and their equipments for the consideration of One Dollar per year and has loaned certain of said devices and their equipments without charge; but it denies that it has sold any of said devices and their equipments for prices or considerations which do not represent reasonable returns on the investments therein, or at prices below the cost of producing and vending the same; and it further denies, upon information and belief, that it has either sold, leased or loaned any of such devices or other equipments with the effect of stifling and suppressing competition in the sale of products or in the sale, leasing or loaning of such devices and other equipments, or with the effect of injuring competitors.

Said respondent admits that certain of its contracts for the lease or loan of devices and their equipments provide that the lessee or borrower thereof shall not place in such devices any refined oil or gasoline other than the products of respondent, but said respondent is without knowledge as to each and every allegation in Paragraph "Three" of the first alleged cause of action herein not hereinbefore specifically admitted or denied.

II.

Said respondent denies, upon information and belief, that it has been using unfair methods of competition in interstate commerce in violation of the provisions of Section 3 of the Act of Congress, approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes."

Further answering the second alleged cause of action in said complaint,

1. Said respondent admits that it is a corporation organized, existing and doing business under and by virtue of the laws of the State

of New Jersey, with a place of business in the City of New York, State of New York, and that for more than four years last past it has been engaged in the business of selling refined oil and gasoline in various states of the United States and the District of Columbia in competition with various persons, firms, corporations and copartnerships; but it denies that it is or has been engaged in the business of leasing oil pumps or storage tanks or their equipment.

2. Said respondent admits that, in the conduct of its business, it purchases refined oil and gasoline, hereinafter referred to as "products," and also purchases oil pumps, storage tanks or containers, hereinafter referred to as "devices," and that it handles and stores certain of the same in the various states of the United States and transports or causes to be transported certain thereof in interstate commerce; that certain of such products are sold and certain of such devices are leased or loaned by respondent to various persons, firms, corporations and copartnerships, and that it moves or caused to be moved certain of such products and devices from one state to another, and that respondent conducts a trade in such products and devices between the various states of the United States and that it sells its products and certain of such devices in competition with various persons, firms, corporations and copartnerships; but said respondent is without knowledge as to each and every allegation contained in Paragraph "Two" of the second alleged cause of action not hereinbefore specifically admitted or denied.

3. Said respondent denies, upon information and belief, each and every allegation contained in Paragraph "Three" of the second alleged cause of action.

III.

And for the further answer and defense to the complaint herein and the alleged causes of action herein contained, said respondent alleges:

1. That respondent is and has been for many years a manufacturer and marketer of refined oil and gasoline, and that it sells said products under its own lawful brands and trade names in the District of Columbia and in various states of the United States in competition with other persons, firms, corporations and copartnerships; that it purchases from the manufacturers thereof pumps, storage tanks and containers designed for use in the storage and handling of gasoline and refined oil, hereinafter referred to as "devices" and that in connection with and to promote and increase its sales of gasoline and refined oil, it sells, leases and loans such devices. Its sales of such devices have invariably been outright and without any limitations or conditions whatsoever and on prices which yielded to it a reasonable profit. It has also leased for a rental of One Dollar per year, and loaned without charge to many of its customers, devices for the storage and handling of refined oil and gasoline and, inasmuch as the devices so leased or loaned

bear the name of respondent and/or the brands and trade names of its products in such manner as to announce and represent to the public that the oils or gasoline stored or handled therein were the products of respondent, respondent has in the agreement or contract of lease or loan imposed the condition that the lessee or borrower should not store or handle products other than those of respondent in said devices; but respondent has never, in connection with the sale of its products or of the sale, lease or loan of tanks, imposed or sought to impose the understanding or agreement, directly or indirectly, that the vendee, lessee or borrower should not buy or deal in the products of any other manufacturer or marketer of refined oil or gasoline; and, upon information and belief, said respondent has not been and is not using unfair methods of competition in interstate commerce in violation of the Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," or of the Act of Congress, approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," or otherwise.

Wherefore, said respondent demands judgment dismissing the complaint herein, with costs.

CHESTER O. SWAIN,
Respondent's Attorney.

Office and Post Office Address:
26 Broadway, New York City.

STATE OF NEW YORK,
County of New York, ss.:

M. H. EAMES, being duly sworn, deposes and says: That he is an officer, to wit, Assistant Secretary, of the Standard Oil Company, the respondent in the within action; that he has read the foregoing answer and knows the contents thereof; that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged on information and belief, and that as to those matters, he believes it to be true.

M. H. EAMES.

Sworn to before me this 29th day of August, 1919.
[SEAL.] LEWIS G. DURYEA,
Notary Public, Queens County.

Commission expires 1921. New York Certificate No. 107.

Notice of final hearing before the commission.

The United States of America.

Before the Federal Trade Commission, Washington, D. C.

FEDERAL TRADE COMMISSION
v.
THE STANDARD OIL COMPANY OF NEW JERSEY. } Docket No. 337.

Please take notice that the final hearing in the above entitled proceeding will be had before the Commission at its offices in the City of Washington, D. C., on the 18th day of February, 1920, at 2.00 o'clock in the afternoon of that day.

(Sgd.) CLAUDE R. PORTER,
Chief Counsel for Federal Trade Commission.

To CHESTER O. SWAIN, Esq.,
26 Broadway, New York.

Acknowledgment is hereby made of the receipt of the above notice this 6th day of February, 1920.

(Sgd.) CHESTER O. SWAIN,
By J. H. HAYES,
Attorney for Respondent.

Excerpts from oral argument before the Commission (dated February 18, 1920), relative to admission of testimony taken at Columbus and Cleveland, Ohio.

Before the Federal Trade Commission.

FEDERAL TRADE COMMISSION
v.
ATLANTIC REFINING COMPANY. } Docket No. 131.

Also Dockets Nos. 134, 309, 311, 312, 313, 316, 320, 331, 333, 335, 337, and 373.

Washington, D. C., February 18, 1920.

Before the Federal Trade Commission.

FEDERAL TRADE COMMISSION, COMPLAINANT,
v.
ATLANTIC REFINING COMPANY, RESPONDENT. } Docket No. 131.

FEDERAL TRADE COMMISSION, COMPLAINANT,
v.
STANDARD OIL COMPANY OF NEW YORK, RESPONDENT. } Docket No. 134.

FEDERAL TRADE COMMISSION, COMPLAINANT, v. MALONEY OIL & MANUFACTURING CO., RESPONDENT.	Docket No. 309.
FEDERAL TRADE COMMISSION, COMPLAINANT, v. STERLING OIL CORPORATION, RESPONDENT.	Docket No. 311.
FEDERAL TRADE COMMISSION, COMPLAINANT, v. PAVANIA OIL COMPANY, RESPONDENT.	Docket No. 312.
FEDERAL TRADE COMMISSION, COMPLAINANT, v. RED "C" OIL MANUFACTURING CO., RESPONDENT.	Docket No. 313.
FEDERAL TRADE COMMISSION, COMPLAINANT, v. KENDALL REFINING COMPANY, RESPONDENT.	Docket No. 316.
FEDERAL TRADE COMMISSION, COMPLAINANT, v. GULF REFINING COMPANY, RESPONDENT.	Docket No. 320.
FEDERAL TRADE COMMISSION, COMPLAINANT, v. HARRIS & COMPANY, ELMER E., RESPONDENT.	Docket No. 331.
FEDERAL TRADE COMMISSION, COMPLAINANT, v. SUOR OIL PRODUCTS CORPORATION, RESPONDENT.	Docket No. 333.
FEDERAL TRADE COMMISSION, COMPLAINANT, v. LOUIS BLAUSTEIN (AMERICAN OIL CO.), RESPONDENT.	Docket No. 335.
FEDERAL TRADE COMMISSION, COMPLAINANT, v. STANDARD OIL CO. OF NEW JERSEY, RESPONDENT.	Docket No. 337.
FEDERAL TRADE COMMISSION, COMPLAINANT, v. THE TEXAS OIL COMPANY, RESPONDENT.	Docket No. 373.

WASHINGTON, D. C.,
Wednesday, February 18, 1920.

The above-entitled cases came on for oral argument before the Commission at 2.30 o'clock p. m.

Present: Commissioners Murdock (chairman) and Thompson.

Appearances: Mr. J. A. Burdeau, appearing on behalf of the Federal Trade Commission; Mr. Peter M. Speer (26 Broadway, New York City), appearing on behalf of the Standard Oil Company of New York; Mr. B. H. Hartogensis (Equitable Building, Baltimore, Md.), appearing on behalf of the American Oil Company; Mr. Yale L. Schekter (Morris Bldg., Philadelphia, Pa.), appearing on behalf of the Atlantic Refining Company; Mr. James L. Nesbitt, appearing on behalf of The Texas Oil Company.

* * * * *

Argument of Mr. Peter M. Speer,

Appearing on behalf of the Standard Oil Company of New York.

MR. SPEER: Gentlemen of the Commission.—I won't be able to make anything but a very brief discussion, and before I begin the discussion I want to renew the motion which I made when the testimony was closed in New York. I made a motion that the testimony taken in the Ohio cases which were heard, the testimony taken at Columbus, the first testimony taken in these cases, at which we were not represented—the Commission was represented—that it be regarded as a part of the testimony in this case. Counsel for the Commission was not willing to agree to it then. Possibly he has no objection to it now.

MR. BURDEAU: I say now that it really rests with the Commission. There might be objections. There are cases included in this group of cases that might not want to have testimony taken in Ohio included with this group consolidated here. I personally have no objection to it. If that had been done I might have prepared my case more fully. If the Commission feels that the respondents here ought to have the additional testimony, I haven't any personal objection to it.

MR. SPEER: That motion was joined in, I think, by the Texas Company, the Atlantic Refining Company and the Standard Oil Company of New Jersey.

MR. BURDEAU: I cannot see where there would be any substantial objection to it, because the questions were all the same, and the testimony was all the same.

THE CHAIRMAN: Would it complicate the matter at all, documentarily, in the event of an appeal?

Mr. BURDEAU. If the stipulation is confined to the respondents who desire that, it would not complicate it at all. It would simply mean transmitting the additional testimony.

THE CHAIRMAN: Well, with that understanding that it is so confined, it is agreed to.

Commission's report, findings of fact and conclusions.

(Dated April 27, 1920.)

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss.:

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 27th day of April, A. D. 1920.

Present: Victor Murdock, chairman, Huston Thompson, William B. Colver, Nelson B. Gaskill, John Garland Pollard, commissioners.

FEDERAL TRADE COMMISSION
v.
STANDARD OIL COMPANY OF NEW JERSEY. } Docket No. 337.

The Federal Trade Commission having issued and served its complaint herein wherein it is alleged that it had reason to believe that the above-named respondent, Standard Oil Company of New Jersey, has been and now is using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and has been and now is violating the provisions of Section 3 of an Act of Congress approved October 15, 1914, entitled, "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," and that a proceeding by it in respect of such alleged violation of Section 5 of the Act of September 26, 1914, would be to the interest of the public, and fully stating its charges in that respect, and the respondent having entered its appearance by Chester O. Swain, its attorney, and having duly filed its answer, admitting certain of the allegations of said complaint and denying certain others thereof, and containing certain allegations as affirmative defense, and the Commission having offered testimony in support of the charges of said complaint, and the respondent having offered testimony in support of its answer and defenses, and the cause having been duly argued before the Commission, and the Commission having duly considered the record and being fully advised in the premises, now makes its report and findings as to the facts, and conclusions:

Findings of fact.

PARAGRAPH ONE. That the respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office located in the City of New York, State of New York, and is now and has been engaged in the business of purchasing and selling refined oil and gasoline, and

is largely engaged in refining crude petroleum, and that it is now and has been during the four years last past, in connection with its aforesaid business, engaged in the leasing and loaning, but not in the manufacture, of oil pumps, storage tanks and containers, and equipment hereinafter referred to as devices, in various states of the United States, in competition with numerous other persons, firms, copartnerships and corporations also engaged in the business of selling refined oil and gasoline, and refining crude petroleum.

PARAGRAPH TWO. That the respondent, in the conduct of its business as aforesaid, and as hereinafter more particularly described, extensively refines petroleum and its products and purchases refined oil and gasoline and also purchases oil pumps, storage tanks and containers hereinafter referred to as "devices." That respondent has been and now is maintaining numerous storage stations in various states to which it ships from its refineries, refined oil and gasoline in bulk. And that the said refined oil and gasoline is thereafter sold and delivered to retail dealers in the said several states. That the respondent, in the course of its said business, leases and delivers said devices to various persons, firms, co-partnerships and corporations, in various states other than those in which the said devices are purchased by the respondent, and that in the course of commerce in buying and selling said devices, said devices are moved to, through and among the various states of the United States, and that there is a constant current of trade in the conduct of its said business in buying and selling said equipment among said various states of the United States.

PARAGRAPH THREE. That during all of said period, respondent in the course of commerce among the several states and territories of the United States and in the conduct of its business as aforesaid, has been and now is leasing to retailers of its petroleum products, said devices for use by such retailers in storing and handling respondent's said petroleum products. That respondent, in leasing such devices as aforesaid, during said period, has made and does now make, contracts or leases with the said retailers in and by the terms of which the said retailer agrees to use the said device for containing, storing and vending the products of the respondent, exclusively. That the rental or lease charge provided for in such contracts is a nominal sum and that no other consideration for the leasing of such equipments by respondent, is provided for by said contracts, and that such devices are leased at nominal rentals as aforesaid, to promote and advance respondent's petroleum and gasoline business. That such nominal sums or rentals do not afford a reasonable profit to respondent on the amount invested in such devices. That the respondent leases such equipments in competition in interstate commerce with manufacturers of similar equipments who are engaged in the sale of the same in such commerce.

PARAGRAPH FOUR. That the respondent sells its said products in various states and territories of the United States in competition

with other refiners and wholesale dealers in petroleum products and gasoline, and respondent has practiced the leasing of said devices to retailers in the various states and territories as aforesaid, as a method of competing with other firms, persons, partnerships and corporations also engaged in refining and selling in wholesale quantities, gasoline, refined oil and petroleum products.

PARAGRAPH FIVE. That the contracts mentioned herein generally expressly provide that said devices shall be used by the lessee only for the purpose of holding and storing the respondent's said petroleum products and all of said contracts or leases which the respondent has entered into as aforesaid, have been made on the condition, agreement or understanding, that the lessee or purchaser thereof should use the said device only for the purpose of holding and storing petroleum products purchased from the respondent. That a small number of retail dealers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid, handle similar products of respondent's competitors, but a large majority of the retailers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid, require and use in their business only a single pump outfit.

PARAGRAPH SIX. That the respondent has practiced the leasing or selling of such devices upon the terms and conditions aforesaid, for the purpose of obtaining and holding customers, and of preventing its competitors from obtaining as customers, the retail dealers with whom it has entered into such contracts or leases as aforesaid.

PARAGRAPH SEVEN. That many competitors of the respondent do not sell or lease such devices to retail dealers upon the terms and conditions referred to herein, and such competitors have lost numerous customers to the respondent as a result of the respondent's practice of offering and leasing said devices to such retail dealers upon the terms and conditions aforesaid.

Conclusions.

That the practice of leasing such devices at a nominal rental and of selling said devices for a nominal consideration, is an unfair method of competition in interstate commerce as against the competitors of respondent engaged in the manufacture of such devices, and in the sale of the same for profit, in the territory wherein the respondent leases such devices and also as against competitors of respondent engaged in the business of refining crude petroleum and selling at wholesale refined oils, gasoline and petroleum products, who do not invest in or make use of such devices for the purpose and on the terms and conditions aforesaid.

That the methods of competition and the business practices set forth in the foregoing findings as to the facts are, under the circumstances set forth herein, unfair methods of competition in interstate commerce within the meaning of Section 5 of an Act of Con-

gress approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and constitute a violation of Section 3 of an Act of Congress approved October 15, 1914, entitled, "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes."

(Signed) VICTOR MURDOCK,
Chairman.

HUSTON THOMPSON,
WILLIAM B. COLVER,
NELSON B. GASKILL,
Commissioners.

Dated this 27th day of April, 1920.

Commission's order to cease and desist.

(Dated April 27, 1920.)

UNITED STATES OF AMERICA,
Before the Federal Trade Commission, ss.:

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 27th day of April, A. D. 1920.

Present: Victor Murdock, chairman, Huston Thompson, William B. Colver, Nelson B. Gaskill, John Garland Pollard, commissioners.

FEDERAL TRADE COMMISSION *v.* STANDARD OIL COMPANY OF NEW JERSEY.	Docket No. 337.

The Federal Trade Commission having issued and served its complaint herein wherein it is alleged that it had reason to believe that the above-named respondent, Standard Oil Company of New Jersey has been and now is using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and has been and now is violating the provisions of Section 3 of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," and that a proceeding by it in respect of such alleged violation of Section 5 of the Act of September 26, 1914, would be to the interest of the public, and fully stating its charges in that respect, and the respondent having entered its appearance by Chester O. Swain, its attorney, and having duly filed its answer, admitting certain of the allegations of said complaint and denying certain others thereof, and containing certain allegations as affirmative defense, and the Commission hav-

ing offered testimony in support of the charges of said complaint, and the respondent having offered testimony in support of its answer and defenses, and the cause having been duly argued before the Commission, and the Commission having duly considered the record and being fully advised in the premises, and having made and filed its report, findings and conclusions, which said report, findings and conclusions are hereby referred to and made a part hereof.

Now, therefore, it is ordered, that the respondent, Standard Oil Company of New Jersey, forever cease and desist from:

(1) Directly or indirectly leasing pumps or tanks or both and equipment for storing or handling petroleum products in furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of same after making due allowance for depreciation and other items usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom, and from doing any matter or thing which would have the same unlawful effect as that resulting from the practice herein prohibited, and by reason of which this order is made.

(2) Entering into contracts or agreements with dealers in its petroleum products or from continuing to operate under any contract or agreement already entered into whereby such dealers agree or have an understanding that as a consideration for the leasing to them of such pumps and tanks and their equipment, the same shall be used only for storing or handling the products of respondent, and from doing anything having the same unlawful effect as that resulting from the practice herein prohibited, and by reason of which this order is made.

Provided however, that as to such pumps and tanks and equipments as are now leased by respondent, contrary to the provisions of this order, respondent shall be required, four months from the date of service hereof, to enter into new contracts or agreements with respect to same which shall not be incompatible with the purport and intent of this order.

It is also ordered under and by virtue of the authority conferred on the Commission by Paragraph B of Section 6 of "An Act to create a Federal Trade Commission, to define its powers and duties and for other purposes," approved September 26, 1914, that the said Standard Oil Company of New Jersey, respondent, shall, within thirty days after the expiration of the time allowed for the respondent to comply with this order to cease and desist, report in writing to the Federal Trade Commission, fully stating and setting forth the nature of the changes made in the conduct of its business with respect to such matter involved in the order to cease and desist, and shall set forth in such report in complete detail the plan or plans adopted for the lease, loan, gift or sale of any oil tanks and pumps for use in storing refined oil or gasoline; what plan or plans are in

use or are proposed to be put in use, and also attached to such report, any contract used by the respondent in the conduct of such business.

Dated at Washington, this 27th day of April, A. D. 1920.

By the Commission,

[SEAL.] J. P. Yoder, *Secretary.*

In the United States Circuit Court of Appeals For the Third Circuit.

Standard Oil Company, a corporation, etc., of New Jersey, petitioner, v. Federal Trade Commission, respondent.	On Petition for Review, etc.

Petition for review.

To the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit:

Greeting:

The petition of the Standard Oil Company respectfully shows:

1. That it is a corporation, organized and incorporated under the laws of the State of New Jersey, with its office and principal place of business at Bayonne, New Jersey, within the Third Circuit of the United States Circuit Court of Appeals.

2. That heretofore and on or about the 18th day of July, A. D. 1919, the respondent herein issued its complaint against your petitioner, alleging certain violations of Section 5 of the Act of Congress, entitled "An Act to create a Federal Trade Commission, to define its powers and duties and for other purposes," approved September 26, 1914, and of Section 3 of the Act of Congress entitled "An Act to Supplement existing laws against unlawful restraints and monopolies and for other purposes," approved October 15, 1914.

3. That thereafter the petitioner filed its answer to said complaint and after hearings had, on or about the 27th day of April, A. D. 1920, the said respondent made its report, findings and conclusions, and issued its order directing this petitioner forever to cease and desist from:

(1) "Directly or indirectly leasing pumps or tanks or both and equipment for storing or handling petroleum products in furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of same after making due allowance for depreciation and other items usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom, and from doing any matter or thing which would have the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made.

(2) Entering into contracts or agreements with dealers in its petroleum products or from continuing to operate under any contract

or agreement already entered into whereby such dealers agree or have an understanding that as a consideration for the leasing to them of such pumps and tanks and their equipment, the same shall be used only for storing or handling the products of respondent; and from doing anything having the same unlawful effect as that resulting from the practice herein prohibited, and by reason of which this order is made."

4. That said order also provided: "that as to such pumps and tanks and equipments as are now leased by petitioner, contrary to the provisions of said order, petitioner be required, four months from the date of the service of said order, to enter into new contracts or agreements with respect to same which shall not be incompatible with the purport and intent of the provisions of said order"; and also that within thirty days after the expiration of the time allowed for petitioner to comply with the said order to cease and desist, petitioner report in writing to the Federal Trade Commission fully stating and setting forth the nature of the changes made in the conduct of petitioner's business with respect to such matter involved in the order to cease and desist, and that petitioner should set forth in such report in complete detail the plan or plans adopted for the lease, loan, gift or sale of any oil pumps and tanks for use in storing refined oil or gasoline; what plan or plans are in use or are proposed to be put in use; and also to attach to such report any contracts used by petitioner in the conduct of such business.

5. That your petitioner conceiving itself aggrieved by the making of said report, findings and conclusions and the issuance of said order, desires to obtain a review of the same.

Wherefore your petitioner humbly prays this court review such order entered as aforesaid and set aside the same.

And your petitioner will ever pray.

STANDARD OIL COMPANY.
By W. C. TEAGLE,
Its President.

CHESTER O. SWAIN,
JAMES H. HAYES,
Attorneys for Petitioner.

STATE OF NEW YORK,
County of New York, ss.:

W. C. TEAGLE, of full age, being duly sworn, deposes and says that he is the President of the above-named petitioner, STANDARD OIL COMPANY, and is duly authorized to make this affidavit on behalf of said petitioner, and that the said petition is true of his own knowledge, except as to the matters therein stated on information and belief and as to these matters he believes it to be true.

W. C. TEAGLE.

Sworn to before me this 6th day of Aug., 1920.

M. H. EAMES,
[SEAL.] *Notary Public Kings County.*

Certificate filed in New York County. Certificate No. 67.

STATE OF NEW YORK,
County of New York, ss.: No. 35690 Series B.

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court in and for said county.

Do Hereby Certify, That said Court is a Court of Record, having by law a seal; that M. H. Eames, whose name is subscribed to the annexed certificate or proof of acknowledgement of the annexed instrument was at the time of taking the same a Notary Public acting in and for said county, duly commissioned and sworn, and qualified to act as such; that he has filed in the Clerk's Office of the County of New York a certified copy of his appointment and qualification as Notary Public for the County of Kings with his autograph signature; that as such Notary Public, he was duly authorized by the laws of the State of New York to protest notes; to take and certify depositions; to administer oaths and affirmations; to take affidavits and certify the acknowledgment and proof of deeds and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this state; and further, that I am well acquainted with the handwriting of such Notary Public and verily believe that his signature to such proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at the City of New York, in the County of New York, this 7 day of Aug. 1920.

WM. F. SCHNEIDER,
Clerk.

In the United States Circuit Court of Appeals for the Third Circuit.

No. 2599. October term, 1920.

STANDARD OIL COMPANY, PETITIONER,

vs.

FEDERAL TRADE COMMISSION, RESPONDENT.

And afterwards, to wit, on the 4th day of October, 1921, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Victor B. Woolley, and Hon. J. Warren Davis, Circuit Judges, and Hon. Hugh M. Morris, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 14th day of July, 1922, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision.

In the United States Circuit Court of Appeals for the Third Circuit.

STANDARD OIL COMPANY, PETITIONER, *vs.* FEDERAL TRADE COMMISSION, RESPONDENT.	No. 2599. October Term 1920.
GULF REFINING COMPANY, PETITIONER, *vs.* FEDERAL TRADE COMMISSION, RESPONDENT.	No. 2609. October Term 1920.
MALONEY OIL & MANUFACTURING COMPANY, PETITIONER, *vs.* FEDERAL TRADE COMMISSION, RESPONDENT.	No. 2632. March Term 1921.

Separate petitions to set aside several orders of the Federal Trade Commission.

Before WOOLLEY and DAVIS, Circuit Judges, and MORRIS, District Judge.

WOOLLEY, Circuit Judge. In these proceedings we are asked to review and set aside three orders of the Federal Trade Commission commanding the petitioning corporations forever to cease and desist from a practice found by the Commission to violate Section 5 of the Act creating the Federal Trade Commission (38 Stat. 717) and Section 3 of the Clayton Act. (38 Stat. 730.) The applicable provisions of these statutes are, in the first, "That unfair methods of competition in commerce are * * * unlawful", and, in the second, "That it shall be unlawful for any person engaged in commerce to lease * * * or make a sale * * * of goods, * * * machinery, * * * or other commodities * * * on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, * * * machinery, * * * or other commodities of * * * competitors of the lessor or seller, where the effect of such lease or sale, * * * or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

These are three of a large number of cases involving the same practice. They were tried in three groups. The testimony in one group bore most directly on gasoline marketing in states along the Atlantic seaboard. In another it related particularly to business done by companies within the State of Ohio. In the third it concerned business farther west. As the testimony in all cases was in the main identical, the twelve comprising the eastern group (which includes the cases at bar) were combined and heard together.

The testimony discloses a practice which has been widely pursued in the eastern part of the United States by corporations refining and marketing gasoline. It consists of what is practically a loan, or technically a lease without rental, by a wholesaler to a retailer, of equipment for the temporary storage, measurement and delivery of gasoline to the consuming public. The practice extends mainly to the retailer whose place of business is referred to as a "curb filling station." The leased equipment is known as a "curb pump outfit" and comprises a sunken tank for the storage of gasoline and a pump of familiar design by which gasoline is drawn from the tank and delivered to motor vehicles. The retailer is the proprietor of the station and is generally engaged in some other business. Typical of his class are keepers of country stores, residents in hamlets and at cross-roads, and farmers. The practice does not relate to retail stations owned and managed by the refining and marketing companies themselves. These are the more elaborate affairs also familiar to the public and generally known as "service stations." Proprietors of garages comprise an intermediate class of retailers to whom the practice in some measure extends.

The practice held by the Commission to offend against the statutes is found wholly within the terms of the leasing contracts. The form of the contract is important in two respects: First, in what the wholesaler requires the retailer to do; and second, in what it does not require him to do. The form of contract used by the Standard Oil Company is identical in substance with contracts used by the other petitioners. Paraphrased, it is as follows:

Reciting by preamble that the retailer is now purchasing gasoline from the wholesaler for sale to its customers and has requested it to install on his premises equipment for the better storage and handling of the gasoline so purchased, and that in compliance with his request the wholesaler is about to make the installation, it is agreed between them that the "equipment shall be used solely for the storage and handling of motor gasoline purchased by the" retailer from the wholesaler. Then follow undertakings by the retailer that he will maintain the equipment in good condition at his own cost; that he will not encumber or remove it or permit it to be seized or taken in execution; and that he will indemnify the wholesaler from liability for injuries occasioned by leakage, fire, or explosion of gasoline. The contract concludes with four provisions for its termination: First, upon the use of the equipment by the retailer for any other purpose than the storage and handling of gasoline purchased from the wholesaler; second, upon the retailer's failure for thirty days to purchase gasoline from the wholesaler; third, upon the sale of the premises by the retailer; and fourth, by either party upon five days' notice in writing to the other party; with the right of the wholesaler in any event to enter upon the premises and remove the equipment.

Having stated what the contract requires the retailer to do, the things which it does not require of him are equally important.

The first is he is not required to pay any license fee, rental or other thing for the use of the equipment; nor is he restricted in his business to the equipment covered by the contract. On the contrary, he may use other equipment leased by competing wholesalers, or purchased by himself. Nor does the contract expressly tie him to the wholesaler's products. He may freely deal in gasoline or other petroleum products purchased from competing wholesalers. He may not, however, use the equipment of the contract for storing and handling a competitor's gasoline.

In justification of their practice the petitioners maintain that the curb pump outfit is a natural development of the oil industry. In this industry the distribution and marketing of petroleum products more or less volatile and therefore more or less dangerous has always been a serious problem. The petitioners point out that for many years kerosene and other less volatile oils have been sold to retailers in barrels or direct to householders in cans. The barrels and cans being the property of the wholesaler are returned when the contents are removed. When the market for gasoline and more volatile oils developed, the wholesaler for safety shipped them to the retailer in steel barrels or drums. These also remained the property of the wholesaler and were returned when empty. With the marvelous increase of motor vehicles in all sections, urban and rural, there came a corresponding necessity for wider distribution of gasoline. Distribution from large central reservoirs to distant places by barrels and drums was no longer practicable. Then curb filling stations were established and curb pump outfits were installed whereby gasoline is delivered by tank trucks to many smaller centers and there stored and sold. These centers grew in number as the demand spread. At first this demand was met by one station and one outfit. As the demand increased stations and outfits were multiplied, the purpose of the practice, the petitioners claim, being to increase business by making easy and convenient the sale of gasoline to the public everywhere. But outfits cost money and the little storekeeper and the farmer by the roadside could not be induced, and frequently were not able, to invest capital in the purchase of an outfit. The result was that outfits were purchased by the wholesaler and loaned or leased to the retailer at practically no cost to him, yet upon the terms with respect to their use which we have detailed.

The view which the Federal Trade Commission takes of this practice is quite different. Its conclusions based on its findings of fact are that the installation of one outfit either supplies the needs of the retailer or meets the demand of his locality, and that, in consequence, the retailer has neither economic means nor personal desire to permit the installation of more than one outfit on his premises; that the contract for an outfit has the effect of tying the retailer to the products of the one wholesaler so long as one outfit meets the local demand and of substantially lessening competition by enabling

the wholesaler to monopolize first one retailer and then, as the contracts are multiplied, to monopolize many thousand retailers, and eventually the whole territory in which they reside. Finding this practice of the petitioners violative of the laws referred to, the Commission entered the orders to cease and desist here under review.

On this statement of facts we shall discuss the practice as it bears on four classes of interested parties. The first of these is the public.

The Federal Trade Commission Act, in so far as proceedings thereunder are founded on a public interest, provides:

"* * * if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect. * * *." (38 Stat. 719, Sec. 5. F. T. C. *vs.* Gratz, 253 U. S. 421.)

The petitioners challenge the authority of the Federal Trade Commission to institute and prosecute these proceedings on two grounds as affecting the public interest. The first is, that the complaints do not allege facts necessary to show that public interest is involved. Upon taking this position there arose an issue whether public interest is a matter to be found by the Federal Trade Commission preliminary to the issuance of its complaints, or is a fact to be alleged in the complaints and proved like any other fact. This question, in view of the record, is purely academic, because whether public interest is to be regarded as a consideration moving the Commission to action or a jurisdictional fact to be pleaded and proved in support of its action, the fact of public interest in these cases is abundantly established.

The law of unfair competition in its modern conception regards as its chief concern the effect of forbidden acts upon consumers. The Congress in passing the Clayton Act and denouncing tying contracts and leases obviously had in mind the public as the principal sufferer therefrom. It is true, as said by Judge Denison in Steers *vs.* United States, 192 Fed. 1, in speaking of the Sherman Anti-Trust Act, 26 Stat. 209, that the theory of injury to the public lies at the bottom of the statutes and is directed against things which tend to deprive the public of the advantages which flow from free competition. Having denounced methods of business which are unfair and which substantially lessen competition and tend to create a monopoly, it is clear that in a case of this kind the public is within the protection of these statutes. If under these statutes the practice is illegal, then in truth the public which pays the bill is the main sufferer. As the practice extends to many thousand retailers and comprehends many million transactions through territory comprising more than half of the population of the United States, it is idle to say that the public has not an interest. Therefore, on this contention we think the petitioners have wholly failed to grasp the principle and purpose of the statutes and are entirely wrong in their contention.

The next contention of the petitioners, however, is very different. It squarely meets the issue of public interest and is to the effect that the evidence fails to show that the public has been injured. With

this we agree. Postponing discussion of the effect of the practice upon competition and monopoly, we do not find that the practice has increased the cost of distribution or has enhanced the price of gasoline to the public. On the contrary it has decreased the cost of distribution. Whether the price to the public has been reduced, we cannot say. Clearly the public has found an advantage in the practice both in the matter of convenience and in the certainty of getting the precise make of gasoline advertized on the globe of the pump. On the other hand, if the orders of the Commission commanding the petitioners to cease and desist from the practice and thereafter to lease outfits to retailers only on remunerative rentals stand, the inevitable result will be that the number of curb filling stations will be reduced, thereby lessening the convenience to the public; or the rental charged the retailer for the outfit will be covered by fixing wholesale prices so as to allow him a larger profit. In the readjustment the public doubtless will undergo its usual experience of paying higher prices.

The second class of parties interested in or affected by the practice is that of oil refiners or wholesalers, including both the petitioning wholesalers—the leading actors in the practice—and their wholesale competitors. The parts played by the members of this class depend for their legality upon the scope and purpose of the two statutes involved.

The first paragraph of each of the orders of the Commission does not deal with the restrictive clause of the contract: it deals solely with the leasing of outfits for a nominal rental or for no rental at all. One question decided by the Commission and here under review is whether this feature of the contract is an unfair method of competition within Section 5 of the Federal Trade Commission Act. Interpreting this section, the Supreme Court, in Federal Trade Commission *vs.* Gratz, 253 U. S. 421, 427, said:

"The words "unfair method of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The Act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

Therefore in determining, as matter of law, whether leasing of gasoline outfits without rentals is an unfair method of competition, we shall inquire whether the method is characterized by oppression of competitors or is against public policy because of its dangerous tendency unduly to hinder competition or create monopoly. So also under the Clayton Act, by force of which the Commission framed the second paragraph of each of its orders denouncing the restrictive

clause of the contract, we shall, upon the authorities given below, make a similar inquiry with reference to the effect of the practice in lessening competition and creating a monopoly. To make clear the principle upon which we shall examine the testimony and decide these cases, it may be well to observe that the Clayton Act, which is a part of the scheme of laws against unlawful restraints and monopolies, does not wait for its operation until monopolies have been created and restraints of trade established, but seeks to reach them in their incipiency and stop their growth. Yet, in thus avoiding an objectionable effect by removing the cause, the Congress did not intend the statute to reach every remote lessening of competition or every dim and uncertain tendency to monopoly. It intended rather that the Commission, and ultimately the courts, should inquire not whether a given practice may possibly lessen competition or possibly create a monopoly, but whether it probably lessens competition—and lessens it substantially—and whether it actually tends to create a monopoly. The Standard Fashion Company *vs.* Magrane-Houston Company, — U. S. —. Though differing somewhat from other laws, as we have indicated, the Clayton Act, nevertheless, deals with matters within the realm of monopoly. Therefore in determining whether given acts amount to unfair methods of competition within the meaning of the Federal Trade Commission Act, or substantially lessen competition and tend to create a monopoly within the meaning of the Clayton Act, the only standard of legality with which we are acquainted is the standard established by the Sherman Act in the words "restraint of trade or commerce" and "monopolize, or attempt to monopolize," and by the courts in construing the Sherman Act with reference to acts "which operate to the prejudice of the public interest by unduly restricting competition or unduly obstructing the due course of trade," and "restrict the common liberty to engage therein." Great Atlantic & Pacific Tea Co. *vs.* Cream of Wheat Co., 224 Fed. 566, 573; affirmed 227 Fed. 46; United States *vs.* American Tobacco Co., 221 U. S. 106, 179; United States *vs.* Patten, 226 U. S. 525, 541; Eastern States Lumber Asso. *vs.* United States, 234 U. S. 600, 613, 614; Standard Oil Case, 221 U. S. 1; Standard Fashion Company *vs.* Magrane-Houston Company, — U. S. —.

Applying this standard to the trade practice here involved, the first question, that of unfair method of competition, relates to the leasing of outfits without rentals.

Is this phase of the practice oppressive upon competitors and does it tend to create a monopoly? Concededly, a lease of a curb pump outfit without rental gives a wholesaler a trade advantage over its competitors. This alone is not unlawful, for such advantage is the object of all competition and is attained whenever one sells another goods of greater excellence or at lower prices than goods offered by others. Does this trade advantage contain the seeds of monopoly? It admittedly leaves competitors free to install competing outfits in

the same locality and in all other localities. It also leaves every competitor free to place its outfit with the same retailer if it can prevail upon him by the ordinary competitive inducements of better goods, lower prices, and easier terms of credit. That the practice imposes upon a competitor the investment of more capital is an argument which would apply with equal force—and with equal infirmity—to competition based on superiority of goods and liberality of credit.

Under the Federal Trade Commission Act declaring unfair methods of competition unlawful—as the Act stood before the passage of the Clayton Act—a loan of a curb pump outfit without return or a lease without rental did not, we think, tend to create a monopoly and, accordingly, was not, in our opinion, an unfair method of competition.

But the Clayton Act, when it came along, bore upon another phase of the contract, namely: upon the clause which restricts the use of the leased outfit to the product of the wholesaler, thereby, the Commission found, lessening competition and tending to create a monopoly. Such a clause of a contract, commonly known as a tying contract, is to be construed not by its terms alone but by its effect as well. The Act looks particularly to the consequences. In the United Shoe Machinery Corporation case, — U. S. —, the Supreme Court said:

"While the clauses enjoined do not contain specific agreements not to use the machinery of the competitor of the lessor, the practical effect of these drastic provisions is to prevent such use. We can entertain no doubt that such provisions as were enjoined are embraced in the broad terms of the Clayton Act which cover all conditions, agreements or understandings of this nature. That such restrictive and tying agreements must necessarily lessen competition and tend to monopoly, is, we believe, equally apparent * * * This system of tying restrictions is quite as effective as express covenants could be and practically compels the use of the machine of the lessor except upon risks which the manufacturers will not willingly incur."

The point of similarity between the United Shoe Machinery Corporation case and the cases at bar is that, in both, the offending clauses did not expressly provide against the use of machinery or equipment of competitors. The difference between the contract clauses in the two cases is that as certain machinery of the United Shoe Machinery Corporation was essential to the lessee in his business, the practical effect of the clauses in that contract, although not specifically prohibiting the use of the machinery of a competitor, was absolutely to prevent its use; while the clause of the contract in the cases under consideration related to but one kind of machine or equipment, and extended to a situation which did not impose upon the lessee the necessity of obtaining something from the lessor which was indispensable in his business, the clause, in consequence, did not have the practical effect of preventing the use of equipment of a competitor.

Also, the cases at bar are distinguished from the Standard Fashion Company *vs.* Magrane-Houston Company, — U. S. —, by the fact that the contract in that case contained an express agreement that the retailer should not sell or permit to be sold on his premises any other make of patterns. Here was a restrictive covenant which by its terms came within the third section of the Clayton Act. In discussing this clause the Supreme Court approved an observation in the opinion of the Circuit Court of Appeals, as follows:

"The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands, of small communities amount to giving such single pattern manufacturer a monopoly of the business in such community. Even in the larger cities, to limit to a single patternmaker the pattern business of dealers most resorted to by customers whose purchases tend to give fashions their vogue, may tend to facilitate further combinations: so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business."

It has been suggested that this expression is apposite to the leasing contract here under discussion. But we think the cases are distinguished by the important fact that there the dealer was restricted by the contract to the sale of patterns of one manufacturer. This eliminated from his business all other patterns and tied him to the patterns of the contract. Here he is restricted in the use of the leased outfit to the storage and delivery of gasoline purchased from the lessor, but he is not limited to the use of one outfit, nor is he hampered in the sale of gasoline and other products of other manufacturers. The contract leaves every competitor free to persuade the retailer to install an additional outfit or to replace the outfit already installed by one of its own; and permits the retailer to yield if he chooses. While the effect of the restrictive clause of the contract in these cases may make competition somewhat more difficult because of the inclination of a satisfied retailer to stand by his wholesaler until another comes along and offers him something better, we are of opinion that the clause does not thereby lessen competition between wholesalers to the extent contemplated by the statute and that a tendency to monopolize the wholesale trade has not been disclosed. "That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial." Standard Fashion Company *vs.* Magrane-Houston Company, — U. S. —; Standard Oil Co. *vs.* F. T. C., 273 Fed. 478; Canfield Oil Co. *vs.* F. T. C., 274 Fed. 571; Sinclair Refining Co. *vs.* F. T. C., 276 Fed. 686.

The third class of parties interested in the practice is that of retailers.

Many retailers buy and own curb pump outfits. With these we have nothing to do except to note that by the practice of leasing outfits competition with them is greatly increased. We are concerned only with the retailer who has not money enough to purchase an outfit, or, having money, does not care to risk it. What happens?

If his locality promises trade, one of the many wholesalers will supply him with an outfit without cost and without risk to him. The only condition imposed is that he shall not store and deliver through the outfit gasoline of any other wholesaler. The tying element in the transaction, if any there be, is the one arising from human nature and business sense, namely: that the retailer will install no other outfit so long as he is satisfied with the quality and price of the wholesaler's gasoline and so long as one outfit serves his trade. The contract leaves him perfectly free to deal in all petroleum products made by competing wholesalers. He is at liberty to install by lease or purchase, as many other outfits as he may choose and to sell through them as many brands of gasoline as he may desire. The leasing contract, being terminable by him at will on brief notice, permits him to change outfits at will, replacing one by another as often in the course of wholesalers' competition as he is induced to do so. The retailer, regarded in the aggregate, is an actor in the practice, who by reason of his number, place and interest causes competition between wholesalers to be increased rather than lessened. If the practice is abridged or abolished the retailer's risk is increased and his number diminished, and, correspondingly, competition is lessened. Certainly the retailer's part in the practice violates neither of the statutes. Nor, for the reasons given, can we think he is monopolized by the wholesaler, or the territory in which many retailers do business under the practice is monopolized.

The fourth class of parties claiming an interest in the practice is that of manufacturers of curb pump outfits. Of these there are a half dozen or more in the country, in none of which the petitioning corporations have an interest. The petitioning corporations do not manufacture pump outfits themselves but purchase them from manufacturers like anyone else. The Commission found as a fact that having purchased outfits, the petitioning corporations then lease them in competition with manufacturers engaged in the sale of like equipment in commerce, and upon this finding drew the conclusion,

"That the practice of leasing such devices at a nominal rental * * * is an unfair method of competition in interstate commerce as against the competitors of respondents engaged in the manufacture of such devices, and in the sale of the same for profit, in the territory wherein the respondent leases such devices * * *."

After the manufacturer has sold equipments to the respondents without condition or limitation, and has turned them loose in commerce, we are at a loss to see just how he can be heard to complain that the equipment so sold and paid for is being leased by the owners on terms which make it difficult for him to sell like equipments to others. As there is involved here no question of fraud, deception, good conscience, or even business ethics, we should hesitate to follow business transactions to this length and determine whether conduct so remotely related to the original transaction of purchase is an unfair method of competition.

Having given these cases full and deliberate consideration, we are of opinion that, while the evidence supports some of the Commission's findings of fact as distinguished from the conclusions drawn from them,—it does not establish the offences laid in the complaints and founded on the statutes, and, accordingly, does not sustain the orders based thereon. Therefore, we are constrained to set aside the orders and direct that the complaints be dismissed.

MORRIS, District Judge, concurring in part and dissenting in part.

The operative parts of the order of the Commission here attacked are that the respondent forever cease and desist from:

"1. * * * leasing pumps or tanks or both and equipment for storing or handling petroleum products in furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of same after making due allowance for depreciation * * *.

"2. Entering into contracts or agreements with dealers in its petroleum products or from continuing to operate under any contract or agreement already entered into whereby such dealers agree or have an understanding that as a consideration for the leasing to them of such pumps and tanks and their equipment, the same shall be used only for storing or handling the products of respondent. * * *."

The first paragraph of the order is directed only to the method of competition whereby the petitioners lease pumps and tanks to retailers at a nominal rental and is concerned not at all with the restrictive or tying clause of the lease. Divorced from the tying clause, leasing the pumps at a nominal rental is, in my opinion, a practice "never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression," nor is that practice against public policy as declared by the Sherman and Clayton Acts and, consequently, is not an unfair method of competition within Sec. 5 of the Trade Commission Act as interpreted by the Supreme Court in Federal Trade Commission v. Gratz, 253 U. S. 421, 427, even though the leasing of the pumps at a nominal rental may, perhaps, have a tendency to lessen competition either in the sale of pumps or in the sale of gasoline at wholesale. I am, therefore, in full accord with the views expressed by the majority of the Court with respect to the first paragraph of the Commission's order.

The second paragraph of the order rests upon Sec. 3 of the Clayton Act. While Sec. 5 of the Trade Commission Act provides "if it shall appear to the Commission that a proceeding by it * * * would be to the interest of the public, it shall issue," &c., no similar provision is found in the Clayton Act. In proceedings under that act public interest is as conclusively presumed as in a criminal proceeding and needs to be neither alleged nor proved. Consequently, as I see it, the petition for review presents with respect to the second

paragraph of the order two questions only. First, whether the lea
here involved are "on the condition, agreement or understandi
that the lessee * * * shall not use or deal in the goods, * *
merchandise * * * or other commodities of a competitor of t
lessor" and, if so, then, second, whether "the effect of such lea
* * * condition, agreement or understanding may be to substa
tially lessen competition or tend to create monopoly in any line
commerce," both within the meaning of Sec. 3 of the Clayton A
The leases contain the following provision:

"That the said equipment shall be used solely for the storage a
handling of motor gasoline purchased by the party of the seco
part from the party of the first part for the purpose aforesaid
While the foregoing clause does not contain a specific agreement n
to use or deal in the gasoline of a competitor of the lessor, yet t
clause falls within the terms of the Clayton Act if its practical effe
is to prevent such use. United Shoe Machinery Corp'n, et al. v. T
United States (Decided April 17, 1922). Whether the practical effe
of the restrictive agreement is to prevent the lessee from using
dealing in the gasoline of a competitor must be determined from t
findings of the Commission and the evidence adduced before it, f
under section 11 of the Clayton Act its findings of fact are conclusiv
if supported by the testimony. One of the findings of the Comm
sion, supported by the testimony, is "that a small number of reta
dealers to whom the respondent leases or sells such devices upon t
terms and conditions aforesaid, handle similar products of respon
ent's competitors, but a large majority of the retailers to whom t
respondent leases or sells such devices upon the terms and conditio
aforesaid, require and use in their business only a single pump or
fit." With respect to the one pump retailer the restrictive clause
the leases in question is as effective in preventing the lessee from usi
or dealing in the gasoline of a competitor of the lessor as if the lea
expressly so provided. True, the lessee may terminate the lease at t
time and under the conditions mentioned therein but that fact do
not enable the tying clause to elude the prohibition of section 3
the Clayton Act for that section operates with respect to short ter
leases and leases at will in like manner and with like force as it do
with respect to long term leases or, for that matter, leases in pe
petuity. The legality or illegality of the tying clause is dependen
not at all upon the duration of the lease or the manner in which
may be terminated. It is likewise true that the lessee has the rig
to install another pump of his own or a pump of a competitor, b
as his business does not warrant or require more than one pump h
has not installed more than one and, consequently, his right is not
practical one but a mere abstract right. The result in my opinion
that in practice the restrictive clause of the leases in question h
prevented and prevents a "single pump" lessee from using or dea
ing in gasoline of a competitor of the lessor just as effectively
if the lease had expressly so provided. Consequently, the lea
falls within the prohibition of Sec. 3 of the Clayton Act if t

effect of such lease "may be to substantially lessen competition or tend to create a monopoly" in selling gasoline at wholesale. Whether its effect may be to substantially lessen competition or tend to create a monopoly is our second question for consideration. The leases are now in force. The fact that they may be terminated at some future time is not relevant to the issue now under consideration. What has already been said shows that "a large majority of the retailers" require for use in their business only a single pump outfit and the practical effect of the restrictive covenant of the lease under which they operate is to prevent such large majority from using or dealing in the gasoline of competitors of their respective lessors. Thereby free competition among the wholesalers of gasoline has been and now is restricted not with respect to an insignificant number of retailers but with respect to a large majority thereof and as effectually as if the leases were in perpetuity and as if they expressly prohibited the lessee from using or dealing in the gasoline of the competitors of the respective lessors.

The petitioners have set up as a reason for the reversal of the Commission's order the excellence of the pump as a means for storing and delivering gasoline. But the Commission has not attacked the pump. On the contrary it admits the pump's many advantages and great utility. It denies, however, the right of the petitioners to make unlawful contracts with respect thereto or otherwise to use it as a means of stifling competition. The petitioners further urge that the restrictive clause is the only method by which they are enabled to use and adequately protect their trademark. Even if this contention were supported by the evidence it would be ineffective, for the petitioners are not at liberty to violate the law of the land whatever proper result may be the consequence of their so doing. The evidence, however, discloses that many pumps are owned by retailers, yet there is no evidence that the name of the gasoline being sold through such pumps is not exhibited in the same manner as it is on the leased pumps. Nor is there any evidence that in such cases the gasoline of one wholesaler has been sold as the gasoline of another. These last contentions of the petitioners are, in my judgment, wholly irrelevant to either of the two issues presented with respect to Sec. 3 of the Clayton Act. Again, the petitioners contend that by means of the leases in question the number of retailers has been substantially enlarged and competition thereby increased rather than lessened. If it be a fact that by means of the leases the number of retailers has been increased such increase was beyond question due to the nominal rental and not to the tying clause and the tying clause is none the less invalid even though accompanied by other clauses that are valid. Furthermore, each increase obtained by the nominal rental was simultaneously monopolized by the tying clause and competition thereby lessened and not increased.

Although not differing from the majority of the Court as to the legal principles by which the correctness of the second paragraph

of the Commission's order should be tested, yet I find myself not in full accord with their ultimate decision for the only conclusion that I am able to reach by applying those principles of law to the facts of these cases is that the effect of the restrictive covenant has been, now is and so "may be" to substantially lessen competition; that the practical effect of that covenant is to prevent the "one pump" retailer from using or dealing in the gasoline of a competitor of his lessor and that, consequently, all "one pump" leases are in violation of Sec. 3 of the Clayton Act and invalid.

(Endorsements:) 2599. Opinion of the Court by Woolley, J., and dissenting opinion by Morris, J. Received & filed Jul. 14, 1922. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit.

No. 2599. October Term, 1920.

STANDARD OIL COMPANY, PETITIONER,

vs.

FEDERAL TRADE COMMISSION, RESPONDENT.

Appeal from the Federal Trade Commission of the United States.

This cause came on to be heard on the transcript of record from the Federal Trade Commission of the United States and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the order of the said Federal Trade Commission in this cause be, and the same is hereby set aside, with direction, that the complaint be dismissed.

VICTOR B. WOOLLEY,
Circuit Judge.

PHILADELPHIA, July 14th, 1922.

(Endorsed:) No. 2599. Order setting aside order of Federal Trade Commission, etc. Received & Filed, July 14th, 1922. Saunders Lewis, Jr., clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, To the ——— of the United States, Greeting:

Whereas, lately before the Federal Trade Commission of the United States ———, before you or some of you, in a cause between The Standard Oil Company, of New Jersey, (defendant below) Petitioner, and the Federal Trade Commission, (plaintiff below) Respondent, and order was entered by the Said Federal Trade Commission against the Standard Oil Company, of New Jersey, on the twenty-seventh day of April, 1920, which order is of record in the office of the said Federal Trade Commission, to which reference is

hereby made, and the same is hereby expressly made a part hereof: as by the inspection of the transcript of the record of the said Federal Trade Commission which was brought into the United States Circuit Court of Appeals for the Third Circuit by virtue of a petition to review agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

And whereas, in the term of October, in the year of our Lord one thousand nine hundred and twenty-one, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the order of the said Federal Trade Commission in this cause be, and the same is hereby set aside, with direction, that the complaint be dismissed.

PHILADELPHIA, *July 14th, 1922.*

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said petition notwithstanding.

Witness, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, at Philadelphia, the seventeenth day of August, in the year of our Lord one thousand nine hundred and twenty-two (1922).

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

Original File No. 2559. U. S. Circuit Court of Appeals, Third Circuit. No. 3, October Term, 1921. Standard Oil Co., of New Jersey, petitioner, *vs.* Federal Trade Commission, respondent. Copy of mandate.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, Third Judicial Circuit. Set.

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original of Vol. I of record and proceedings in this Court in the case of: Standard Oil Company, Petitioner, *vs.* Federal Trade Commission, Respondent, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 11th day of September in the year of our Lord one thousand nine hundred and Twenty-two and of the Independence of the United States the one hundred and Forty-seventh.

[SEAL.] SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 639

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

MALONEY OIL AND MANUFACTURING COMPANY, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Volume I

(Proceedings and Appeal Papers)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. —.

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

MALONEY OIL AND MANUFACTURING COMPANY, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

FEDERAL TRADE COMMISSION
vs.
MALONEY OIL & MANUFACTURING CO. } Docket No. 309.

CERTIFICATE.

I, J. P. Yoder, Secretary of the Federal Trade Commission, do hereby certify that hereunto annexed is a full, true and correct transcript of the proceedings had before the Federal Trade Commission in the above-entitled case, except the testimony, for which other provision has been made.

That this transcript is certified to the United States Circuit Court of Appeals for the Third Circuit, by reason of the filing in the said court of a petition for review of the order to cease and desist entered by said Federal Trade Commission under date of April 27, 1920.

(Sgd.) J. P. YODER,
[SEAL.] *Secretary, Federal Trade Commission.*

Resolution authorizing complaint. (Dated July 18, 1919.)

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 18th day of July, A. D. 1919.

Present: John Franklin Fort, chairman; Victor Murdock, Huston Thomson, William B. Colver, commissioners.

FEDERAL TRADE COMMISSION
vs.
MALONEY OIL & MANUFACTURING COMPANY. } Docket No. 309. Complaint in the matter of the alleged violation of Section 5 of an Act of Congress, approved September 26, 1914, and of the alleged violation of Section 3 of the Act of Congress approved October 15, 1914.

Whereas, the Federal Trade Commission has reason to believe that the Maloney Oil & Manufacturing Company, has violated and is violating the provisions of Section 5 of the Federal Trade Commission Act, and of Section 3 of an Act of Congress approved October 15, 1914; therefore, be it

Resolved: That the Federal Trade Commission issue and serve upon the said Maloney Oil & Manufacturing Company, its complaint stating its charges in that respect in substantially the form hereunto annexed, and be it

Further resolved: That notice be given to the said Maloney Oil & Manufacturing Company, as required by law, that the charges of said complaint will be heard by the Commission at its office in the City of Washington, D. C., on the 15th day of September, 1919, at 10.30 o'clock in the forenoon of the said day, or as soon thereafter as the same may be reached.

Adopted by the Commission.

(Sgd.) J. P. YODER,
Secretary.

[SEAL.]

Complaint. (*Dated July 18, 1919.*)

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 18th day of July, A. D. 1919.

Present: John Franklin Fort, Chairman; Victor Murdock, Huston Thomson, William B. Colver, Commissioners.

FEDERAL TRADE COMMISSION *vs.* MALONEY OIL & MANUFACTURING COMPANY.	Docket No. 309. Complaint in the matter of the alleged violation of Section 5 of the Act of Congress, approved September 26, 1914, and Section 3 of the Act of Congress approved October 15, 1914.

I.

The Federal Trade Commission, having reason to believe from a preliminary investigation made by it, that the Maloney Oil & Manufacturing Company, hereinafter referred to as the respondent, has been using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of the Act of Congress approved September 26, 1914, entitled: "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint stating its charges in that respect on information and belief as follows:

PARAGRAPH ONE: That the respondent, the Maloney Oil & Manufacturing Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsyl

vania, with its principal office and place of business located at the City of Scranton, in said State; that for more than four years last past respondent has been engaged in the business of purchasing and selling refined oil and gasoline, and the leasing and loaning of oil pumps, storage tanks or containers and their equipments, in various States of the United States and the District of Columbia in competition with numerous persons, firms, corporations and copartnerships similarly engaged.

PARAGRAPH TWO: That the respondent, in the conduct of its business, as aforesaid, and as hereinafter more particularly described, purchased refined oil and gasoline, hereinafter referred to as "products," and also purchases oil pumps, storage tanks or containers, hereinafter referred to as "devices," the said devices being used to contain said products, the said products and devices then being handled and stored in the various States of the United States and transported in interstate commerce; that the aforesaid products are sold and the aforesaid devices are leased or loaned by respondent to various persons, firms, corporations and copartnerships; that in the conduct of its business of purchasing and selling such products and selling, leasing or loaning such devices, the same are constantly moved from one State to another by respondent and there is conducted by respondent a constant current of trade in such products and devices between various States of the United States; that there are numerous competitors of respondent who, in the conduct of their business in competition with respondent, purchase similar products and purchase and manufacture similar devices, the said devices being used to contain said products, the said products and devices then being handled and stored in the various States of the United States and transported in interstate commerce; that the aforesaid products are sold and the aforesaid devices sold, leased or loaned by such competitors of respondent to various persons, firms, corporations and copartnerships; that in the conduct of their business, as aforesaid, competitors of respondent constantly move such products and devices from one State to another and there is conducted by said competitors a constant current of trade in such products and devices between the various States of the United States; that respondent and many of its competitors have conducted their said businesses in a similar manner to that above described throughout the past four years.

PARAGRAPH THREE: That respondent in the conduct of its business, as aforesaid, with the effect of stifling and suppressing competition in the sale of the aforesaid products and in the sale, leasing or loaning of the aforesaid devices and other equipments for storing and handling the same, and with the effect of injuring competitors who sell such products and devices, has within the four years last past sold, leased or loaned and now sells, leases or loans the said devices and their equipments for prices or considerations which do not represent reasonable returns on the investments in such devices and their equipments; that many such sales, leases or loans of the aforesaid de-

vices are made at prices below the cost of producing and vending the same: that many of such contracts for the lease or loan of such devices and their equipments provide or are entered into with the understanding that the lessee or borrower shall not place in such devices, or use in connection with such devices and their equipments, any refined oil or gasoline of a competitor: that only a small proportion of the dealers in gasoline and refined oil under such agreements and understandings deal also in similar products of respondent's competitors and that only a small proportion of such dealers require or use more than a single pump outfit in the conduct of their said business: that there are numerous competitors in the sale of such products, who are unable to enter into such lease agreements or understandings because of the large amount of investment required to carry out such lease agreements as a competitive method of selling refined oil and gasoline: that there are numerous other competitors of respondent engaged in the manufacture and sale of said devices and their equipments, who do not deal in refined oil and gasoline, and therefore do not sell or lease said devices and their equipments for a nominal consideration on a condition or understanding that their products only are to be used therein: that the said numerous competitors who were unable to enter into such lease agreements or understandings, as aforesaid, have lost numerous customers in the sale of refined oil and gasoline to respondent because of the business practices of respondent hereinbefore set forth. That the said numerous other competitors of respondent who manufacture and sell said devices and their equipments, but do not sell refined oil and gasoline, as aforesaid, have lost numerous customers and prospective customers for the purchase of their devices and equipments because of the said business practices of respondent, as hereinbefore set forth.

II.

The Federal Trade Commission, having reason to believe from a preliminary investigation made by it, that the Maloney Oil & Manufacturing Company, hereinafter referred to as the respondent, has been using unfair methods of competition in interstate commerce, in violation of the provisions of Section 3 of the Act of Congress, approved October 15, 1914, entitled: "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint, stating its charges in that respect on information and belief as follows:

PARAGRAPH ONE: That the respondent, the Maloney Oil & Manufacturing Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business in the city of Scranton, in said State: that for more than four years last past respondent has been engaged in the business of purchasing and selling refined oil and gasoline and the leasing of oil pumps and storage tanks and their equipments in various States of the United States

and the District of Columbia, in competition with numerous persons, firms, corporations and copartnerships similarly engaged.

PARAGRAPH TWO: That the respondent in the conduct of its business, as aforesaid, and as hereinafter more particularly described, purchases refined oil and gasoline, hereinafter referred to as "products," and also purchases oil pumps, storage tanks or containers, hereinafter referred to as "devices," the said devices being used to contain said products, the said products and devices then being handled and stored in the various States of the United States and transported in interstate commerce. That such products are sold, and such devices sold, leased or loaned by respondent to various persons, firms, corporations and copartnerships: that in the conduct of its business of purchasing and selling such products and selling, leasing or loaning such devices, the same are constantly moved from one State to another by respondent, and there is conducted by respondent a constant current of trade in such products and devices between the various States of the United States: and there are numerous competitors of respondent who in the conduct of their businesses in competition with respondent purchase similar products and purchase and manufacture similar devices, the said devices being used to contain said products, the said products and devices then being handled and stored in the various States of the United States and transported in interstate commerce: that such products are sold and the aforesaid devices sold, leased or loaned by such competitors in competition with respondent to various persons, firms, corporations and copartnerships: that in the conduct of such business, as aforesaid, respondent's competitors constantly move such products and devices from one State to another, and there is conducted by said competitors of respondent a constant current of trade in such products and devices between the various States of the United States: that respondent and many of its competitors have conducted their said businesses in a similar manner to that above described throughout the four years last past.

PARAGRAPH THREE: That the respondent, for four years last past, in the conduct of its business as aforesaid, has leased and made contracts for the lease and is now leasing and making contracts for the lease of said devices and their equipments to be used within the United States, and has fixed and is now fixing the price charged therefor on the condition, agreement or understanding that the lessees thereof shall not purchase or deal in the products of a competitor or competitors of respondent: and that the effect of such leases or contracts for lease, and conditions, agreements, or understandings, may be and is to substantially lessen competition and tend to create a monopoly in the territories and localities where such contracts are operative.

Therefore, notice is hereby given you, the said Maloney Oil & Manufacturing Company, that the charges of this complaint will be heard by the Federal Trade Commission at its office in the City of Washington, D. C., on the 15th day of September, A. D. 1919, at

10.30 o'clock in the forenoon of that day, or as soon thereafter as the same may be reached, at which time and place you shall have the right to appear and show cause why an order should not be entered by the Federal Trade Commission, requiring you to cease and desist from the violations of law charged in this complaint.

And you will further take notice that within thirty (30) days after the service of this complaint, you are required to file with the Commission an answer in conformity with Rule III of the Rules of Practice before the Commission.

In witness whereof, the Federal Trade Commission has caused this complaint to be issued, signed by its Secretary, and its official seal to be affixed hereto at the City of Washington, D. C., this 18th day of July, A. D. 1919.

By the Commission.

[SEAL.] (Sgd.) J. P. YODER,
Secretary.

(Sgd.) CLAUDE R. PORTER,
Chief Counsel for the Commission.

Respondent's answer. (*Filed October 13, 1919.*)

UNITED STATES OF AMERICA,
Before Federal Trade Commission:

FEDERAL TRADE COMMISSION
vs.
MALONEY OIL & MANUFACTURING COMPANY, respondent. } Docket No. 309.

Complaint.

In the matter of the alleged violation of:
Section 5 of an Act of Congress approved September 26, 1914.
Section 3 of an Act of Congress approved October 15, 1914.

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

FEDERAL TRADE COMMISSION
vs.
MALONEY OIL & MANUFACTURING COMPANY. } Docket No. 309. Complaint in the matter of the alleged violation of Section 5 of the Act of Congress approved September 26, 1914, and Section 3 of the Act of Congress approved October 15, 1914.

Answer of the Maloney Oil & Manufacturing Co., respondent.

To the Honorable John Franklin Fort, Chairman; Victor Murdock, Houston Thompson, William B. Colver, Commissioners of Federal Trade Commission:

The Maloney Oil & Manufacturing Company, a corporation organized under the laws of the State of Pennsylvania, the respondent, now and at all times hereafter reserving to itself all manner of benefit and advantage of the manifold errors, uncertainties and imperfections in the complaint in this case contained, respectfully answers the same as follows:

I.

PARAGRAPH ONE: The respondent, Maloney Oil & Manufacturing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal offices and place of business located at the City of Scranton in said State; that for more than four years last past respondent has been engaged in the business of purchasing and selling refined oil and gasoline in a number of States of the United States in competition with numerous persons, firms, corporations and copartnerships similarly engaged. The respondent, Maloney Oil & Manufacturing Company, has not leased or loaned oil pumps or storage tanks or containers and their equipment in any State of the United States, except the State of Pennsylvania. The respondent, the Maloney Oil & Manufacturing Company, has leased and loaned a number of gasoline measuring pumps to its customers at a nominal consideration for the purpose of advertising its Herculene brand of gasoline, conditioned that the customer should not store the product of any competitor in the said tanks of the gasoline measuring pumps. These gasoline measuring pumps are installed in the four cities in Pennsylvania and the vicinity thereof in which the Maloney Oil & Manufacturing Company have storage tanks from gasoline is supplied to its customers, to wit, Scranton, Penna., where its principal office is located; Wilkes-Barre, Penna., Pottsville, Penna., and Carbondale, Penna.

PARAGRAPH TWO: The respondent, the Maloney Oil & Manufacturing Company, in the conduct of its business, as aforesaid, purchases refined oil and gasoline, hereinafter referred to as "products," in various States of the United States, and the said products are transported in interstate commerce; and are sold by the respondent to various persons, firms, corporations and copartnerships; and in the conduct of its business of purchasing and selling such products, the same are constantly moved from one State to another by the respondent, and there is conducted by respondent a constant current of trade in such products. The said respondent, the Maloney Oil & Manufacturing Company, also purchases oil pumps, storage tanks and containers hereinafter referred to as devices, which are leased or loaned by the respondent to various persons, firms, corporations and copartnerships in the conduct of its business of selling, leasing and loaning such devices only in the State of Pennsylvania as set forth in Paragraph One, and the same are not moved from one State to another by the respondent.

PARAGRAPH THREE: The respondent, the Maloney Oil & Manufacturing Company, neither admits or denies the complaint con-

tained in Paragraph Three, except as set forth in answer to Paragraph One and Two. The respondent has no adequate knowledge of the business of pump manufacturers and does not know whether it is to the advantage of these manufacturers to sell their devices to oil companies at wholesale or to sell their devices to garage owners at retail.

II.

PARAGRAPH ONE: The respondent, Maloney Oil & Manufacturing Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at the City of Scranton in said State; that for more than four years last past respondent has been engaged in the business of purchasing and selling refined oil and gasoline in a number of States of the United States in competition with numerous persons, firms, corporations and copartnerships similarly engaged. The respondent, Maloney Oil & Manufacturing Company, has not leased or loaned oil pumps or storage tanks or containers and their equipment in any State of the United States, except the State of Pennsylvania. The respondent, the Maloney Oil & Manufacturing Company, has leased and loaned a number of gasoline measuring pumps to its customers at a nominal consideration for the purpose of advertising its Herculene brand of gasoline, conditioned that the customer should not store the product of any competitor in the said tanks of the gasoline measuring pumps. These gasoline measuring pumps are installed in the four cities in Pennsylvania and the vicinity thereof in which the Maloney Oil & Manufacturing Company have storage tanks from which gasoline is supplied to its customers, to wit: Scranton, Penna., where its principal office is located; Wilkes-Barre, Penna., Pottsville, Penna., and Carbondale, Penna.

PARAGRAPH TWO: The respondent, the Maloney Oil & Manufacturing Company, in the conduct of its business, as aforesaid, purchases refined oil and gasoline hereinafter referred to as "products" in various States of the United States, and the said products are transported in interstate commerce; and are sold by the respondent to various persons, firms, corporations and copartnerships; and in the conduct of its business of purchasing and selling such products the same are constantly moved from one State to another by the respondent, and there is conducted by respondent a constant current of trade in such products. The said respondent, the Maloney Oil & Manufacturing Company, also purchases oil pumps, storage tanks and containers hereinafter referred to as devices, which are leased or loaned by the respondent to various persons, firms, corporations and copartnerships in the conduct of its business of selling, leasing and loaning such devices only in the State of Pennsylvania as set forth in Paragraph One, and the same are not moved from one State to another by the respondent.

PARAGRAPH THREE: The respondent, the Maloney Oil & Manufacturing Company, neither admits or denies the complaint contained in Paragraph Three, except as set forth in answer to Paragraph One and Two. The respondent has no adequate knowledge of the business of pump manufacturers, and does not know whether it is to the advantage of these manufacturers to sell their devices to oil companies at wholesale or to sell their devices to garage owners at retail.

And, the respondent, the Maloney Oil & Manufacturing Company, for further answer, states that it is now and always has been opposed to furnishing dealers or users the tanks and pumps, and has only done so in the few cases to meet competition, and if it is within your power that you will enjoin ALL CONCERNS from continuing the practice, we shall be glad to observe the order in letter and spirit.

Respectfully submitted,

MALONEY OIL & MANUFACTURING COMPANY,
By (Sgd.) JAMES M. COLLINS, *General Manager.*

Order of the Commission designating George McCorkle as examiner in this proceeding. (*Dated November 17, 1919.*)

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss.:

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 17th day of November, A. D 1919.

Present: John Franklin Fort, chairman, Victor Murdock, Huston Thomson, William B. Colver, commissioners.

	Docket.
Federal Trade Commission vs. Atlantic Refining Company	131
" " " " Standard Oil Company of New Jersey	337
" " " " Maloney Oil & Manufacturing Company	309
" " " " Red "C" Oil Mfg. Company	313
" " " " Harris & Company, Elmer E	331
" " " " Suor Oil Products Corporation	333
" " " " Pavania Oil Company	312
" " " " Standard Oil Company of New York	134
" " " " Kendall Refining Company	316
" " " " Louis Blaustein (American Oil Co.)	335
" " " " Gulf Refining Company	320

The above-entitled proceedings being at issue and ready for the taking of testimony, it is hereby

Ordered, That George McCorkle, an Examiner of this Commission, be and he hereby is appointed and designated to receive and hear testimony and to take evidence in said proceedings.

By order of the Commission,

(Sgd.) J. P. YODER.

J. P. YODER,
[SEAL] *Secretary.*

Order combining cases for the taking of testimony.

THE UNITED STATES OF AMERICA.
Before the Federal Trade Commission, Washington, D. C.

FEDERAL TRADE COMMISSION *vs.* ATLANTIC REFINING COMPANY.	Docket No. 131.
FEDERAL TRADE COMMISSION *vs.* STANDARD OIL COMPANY OF NEW JERSEY.	Docket No. 337.
FEDERAL TRADE COMMISSION *vs.* MALONEY OIL & MANUFACTURING COMPANY.	Docket No. 309.
FEDERAL TRADE COMMISSION *vs.* RED "C" OIL MFG. COMPANY.	Docket No. 313.
FEDERAL TRADE COMMISSION *vs.* HARRIS & COMPANY, ELMER E.	Docket No. 331.
FEDERAL TRADE COMMISSION *vs.* SUOR OIL PRODUCTS CORPORATION.	Docket No. 333.
FEDERAL TRADE COMMISSION *vs.* PAVANIA OIL COMPANY.	Docket No. 312.
FEDERAL TRADE COMMISSION *vs.* STANDARD OIL COMPANY OF NEW YORK.	Docket No. 134.
FEDERAL TRADE COMMISSION *vs.* KENDALL REFINING COMPANY.	Docket No. 316.

FEDERAL TRADE COMMISSION *vs.* LOUIS BLAUSTEIN (AMERICAN OIL COMPANY).	Docket No. 335.
FEDERAL TRADE COMMISSION *vs.* GULF REFINING COMPANY.	Docket No. 320.
FEDERAL TRADE COMMISSION *vs.* STERLING OIL CORPORATION.	Docket No. 311.

Order combining cases for taking of testimony.

It appearing to the Commission that the subject-matter of the above-entitled proceedings is the same, and it appearing that the evidence on behalf of the Commission in support of the complaints will be in most respects identical and that a joiner of the proceedings for the purposes of taking testimony will expedite matters in that respect: it is therefore

Ordered, that, for the purpose of taking testimony only, the above-entitled proceedings be and they are hereby joined and that the said testimony as and when taken before an Examiner of this Commission be considered as evidence for and on behalf of the Commission and the respondents in each of the above-entitled proceedings in so far as said evidence may be applicable.

By the Commission.

[SEAL.] (Sgd.) J. P. YODER,
J. P. YODER,
Secretary.

(Sgd.) CLAUDE R. PORTER,
CLAUDE R. PORTER,
Chief Counsel, Federal Trade Commission.

Order of the commission, appointing Joe J. Dunham as examiner in this proceeding. (Dated November 29, 1919.)

UNITED STATES OF AMERICA.

Before Federal Trade Commission, ss.:

At a regular session of the Federal Trade Commission held at its office in the City of Washington, D. C., on the 29th day of November, A. D. 1919.

Present: John Franklin Fort, Chairman; Victor Murdock, Huston Thompson, William B. Colver, Commissioners.

					Docket
Federal Trade Commission	vs.			Atlantic Refining Company	132
"	"	"	"	Standard Oil Company of New Jersey	352
"	"	"	"	Maloney Oil & Manufacturing Company	309
"	"	"	"	Red "C" Oil Mfg. Company	314
"	"	"	"	Harris & Company, Elmer E.	331
"	"	"	"	The Texas Co	373
"	"	"	"	Suor Oil Products Corporation	333
"	"	"	"	Pavania Oil Company	312
"	"	"	"	Standard Oil Company of New York	134
"	"	"	"	Kendall Refining Company	316
"	"	"	"	Louis Blaustein (American Oil Co.)	335
"	"	"	"	Gulf Refining Company	39
"	"	"	"	Sterling Oil Corporation	311

The above-entitled proceedings being at issue and ready for the taking of testimony, it is hereby

Ordered, That Joe J. Dunham, an Examiner of this Commission, be, and he hereby is appointed and designated to receive and hear testimony and to take evidence in said proceedings.

By order of the Commission.

(Sgd.) J. P. YODER.

J. P. YODER,
[SEAL.] *Secretary.*

Commission's report, findings and conclusions. (*Dated April 27, 1920*).

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

At a regular session of The Federal Trade Commission held at its office in the City of Washington, D. C., on the 27th day of April, A. D. 1920.

Present: Victor Murdock, Chairman, Huston Thompson, William B. Colver, Nelson B. Gaskill, Jno. Garland Pollard, Commissioners.

FEDERAL TRADE COMMISSION
vs.
MALONEY OIL & MANUFACTURING COMPANY. } Docket No. 309.

Report, findings and conclusions.

The Federal Trade Commission having issued and served its complaint herein wherein it is alleged that it had reason to believe that the above-named respondent, Maloney Oil & Manufacturing Com-

pany, has been and now is using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled: "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and has been and now is violating the provisions of Section 3 of an Act of Congress approved October 15, 1914, entitled: "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," and that a proceeding by it in respect of such alleged violation of Section 5 of the Act of September 26, 1914, would be to the interest of the public, and fully stating its charges in that respect, and the respondent having appeared and filed its answer, admitting certain of the allegations of said complaint and denying certain others thereof, and containing certain allegations as affirmative defense, and the Commission having offered testimony in support of the charges of said complaint, and the respondent having rested its case without introducing evidence, and the cause having been duly argued before the Commission, and the Commission having duly considered the record and being fully advised in the premises, now makes its Report and Findings as to the Facts and Conclusions:

Findings of fact.

PARAGRAPH ONE: That the respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office located in the City of Scranton, in the State of Pennsylvania, and is now and has been engaged in the business of purchasing and selling refined oil and gasoline, and is largely engaged in refining crude petroleum, and that it is now and has been during the four years last past, in connection with its aforesaid business, engaged in the leasing and loaning, but not in the manufacture, of oil pumps, storage tanks and containers, and equipment hereinafter referred to as devices, in various States of the United States, in competition with numerous other persons, firms, copartnerships and corporations also engaged in the business of selling refined oil and gasoline, and refining crude petroleum.

PARAGRAPH TWO: That the respondent, in the conduct of its business as aforesaid, and as hereinafter more particularly described, extensively refines petroleum and its products and purchases refined oil and gasoline and also purchases oil pumps, storage tanks and containers hereinafter referred to as devices. That respondent has been and now is maintaining numerous storage stations in various States to which it ships from its refineries, refined oil and gasoline in bulk. And that the said refined oil and gasoline is thereafter sold and delivered to retail dealers in the said several States. That the respondent, in the course of its said business, leases and delivers said devices to various persons, firms, copartnerships and corporations, in various States other than those in which the said

devices are purchased by the respondent; and that in the course of commerce in buying and selling said devices, said devices are moved to, through and among the various States of the United States, and that there is a constant current of trade in the conduct of its said business in buying and selling said equipment among said various States of the United States.

PARAGRAPH THREE: That during all of said period, respondent, in the course of commerce among the several States and Territories of the United States in the conduct of its business as aforesaid, has been and now is leasing to retailers of its petroleum products, said devices for use by such retailers in storing and handling respondent's said petroleum products. That respondent, in leasing such devices as aforesaid during said period, has made and does now make contracts or leases with the said retailers in and by the terms of which the said retailer agrees to use the said device for containing, storing and vending the products of the respondent, exclusively. That the rental or lease charge provided for in such contracts is a nominal sum and that no other consideration for the leasing of such equipments by respondent is provided for by said contracts, and that such devices are leased at nominal rentals as aforesaid to promote and advance respondent's petroleum and gasoline business. That such nominal sums or rentals do not afford a reasonable profit to respondent on the amount invested in such devices. That the respondent leases such equipments in competition in interstate commerce with manufacturers of similar equipments who are engaged in the sale of the same in such commerce.

PARAGRAPH FOUR: That the respondent sells its said products in various States and Territories of the United States in competition with other refiners and wholesale dealers in petroleum products and gasoline, and respondent has practiced the leasing of said devices to retailers in the various States and Territories as aforesaid, as a method of competing with other firms, persons, partnerships and corporations also engaged in refining and selling in wholesale quantities, gasoline, refined oil and petroleum products.

PARAGRAPH FIVE: That the contracts mentioned herein generally expressly provide that said devices shall be used by the lessee only for the purpose of holding and storing the respondent's said petroleum products, and all of said contracts or leases which the respondent has entered into as aforesaid, have been made on the condition, agreement or understanding, that the lessee or purchaser thereof should use the said device only for the purpose of holding and storing petroleum products purchased from the respondent. That a small number of retail dealers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid, handle similar products of respondent's competitors, but a large majority of the retailers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid, require and use in their business, only a single pump outfit.

PARAGRAPH SIX: That the respondent has practiced the leasing or selling of such devices upon the terms and conditions aforesaid, for the purpose of obtaining and holding customers, and of preventing its competitors from obtaining as customers, the retail dealers with whom it has entered into such contracts or leases as aforesaid.

PARAGRAPH SEVEN: That many competitors of the respondent do not sell or lease such devices to retail dealers upon the terms and conditions referred to herein, and such competitors have lost numerous customers to the respondent as a result of the respondent's practice of offering and leasing said devices to such retail dealers upon the terms and conditions aforesaid.

Conclusions.

That the practice of leasing such devices at a nominal rental and of selling said devices for a nominal consideration, is an unfair method of competition in interstate commerce as against the competitors of respondent engaged in the manufacture of such devices, and in the sale of the same for profit, in the territory wherein the respondent leases such devices and also as against competitors of respondent engaged in the business of refining crude petroleum and selling at wholesale refined oils, gasoline and petroleum products, who do not invest in or make use of such devices for the purpose and on the terms and conditions aforesaid.

That the methods of competition and the business practices set forth in the foregoing Findings as to the Facts are under the circumstances, set forth herein, unfair methods of competition in interstate commerce within the meaning of Section 5 of an Act of Congress approved September 26, 1914, entitled: "An Act to create a Federal Trade Commission, to define its powers and duties and for other purposes," and constitute a violation of Section 3 of an Act of Congress approved October 15, 1914, entitled: "An Act to supplement existing laws against unlawful restraint and monopolies, and for other purposes."

(Sgd.) VICTOR MURDOCK, *Chairman*,
(Sgd.) HUSTON THOMPSON,
(Sgd.) WILLIAM B. COLVER,
(Sgd.) NELSON B. GASKILL,
Commissioners.

Dated this 27th day of April, 1920.

Commission's order to cease and desist. (*Dated April 27, 1920.*)

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 27th day of April, A. D. 1920.

Present: Victor Murdock, Chairman, Huston Thompson, William B. Colver, Nelson B. Gaskill, Jno. Garland Pollard, Commissioners

FEDERAL TRADE COMMISSION
vs.
MALONEY OIL & MANUFACTURING COMPANY.
} Docket No. 309.

Order.

The Federal Trade Commission having issued and served its complaint herein wherein it is alleged that it had reason to believe that the above-named respondent, Maloney Oil & Manufacturing Company, has been and now is using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled: "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and has been and now is violating the provisions of Section 3 of an Act of Congress approved October 15, 1914, entitled: "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," and that a proceeding by it in respect to such alleged violation of Section 5 of the Act of September 26, 1914, would be to the interest of the public, and fully stating its charges in that respect, and the respondent having entered its appearance and filed its answer, admitting certain of the allegations of said complaint and denying certain others thereof, and containing certain allegations as affirmative defense, and the Commission having offered testimony in support of the charges of said complaint, and the respondent having rested its case without introducing evidence, and the cause having been duly argued before the Commission, and the Commission having duly considered the record and being fully advised in the premises, and having made and filed its Report, Findings and Conclusions, which said Report, Findings and Conclusions are hereby referred to and made a part hereof.

Now, therefore, it is ordered, that the respondent, Maloney Oil & Manufacturing Company, forever cease and desist from:

(1) Directly or indirectly leasing pumps or tanks or both and equipment for storing or handling petroleum products in furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of same after making due allowance for depreciation and other items usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom and from doing any matter or thing which would have the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made.

(2) Entering into contracts or agreements with dealers in its petroleum products or from continuing to operate under any contract or agreement already entered into whereby such dealers agree or have an understanding that as a consideration for the leasing to them of such pumps and tanks and their equipment, the same

shall be used only for storing or handling the products of respondent: and from doing anything having the same unlawful effect as that resulting from the practice herein prohibited, and by reason of which this order is made.

Provided, however, that as to such pumps and tanks and equipments as are now leased by respondent, contrary to the provisions of this order, respondent shall be required, four months from the date of service hereof, to enter into new contracts or agreements with respect to same which shall not be incompatible with the purport and intent of this order.

It is also ordered, under and by virtue of the authority conferred on the Commission by Paragraph B of Section 6 of an Act to create a Federal Trade Commission, to define its powers and duties and for other purposes, approved September 26, 1914, that the said Maloney Oil & Manufacturing Company, respondent, shall within thirty days after the expiration of the time allowed for the respondent to comply with the order to cease and desist, report in writing to the Federal Trade Commission, fully stating and setting forth the nature of the changes made in the conduct of its business with respect to such matter involved in the order to cease and desist, and shall set forth in such report in complete detail the plan or plans adopted for the lease, loan, gift or sale of any oil tanks and pumps for use in storing refined oil or gasoline, what plan or plans are in use or are proposed to be put in use, and also attach to such report, any contracts used by the respondent in the conduct of such business.

Dated at Washington this 27th day of April, A. D. 1920.

By the Commission,

(Sgd.) J. P. YODER,
Secretary.

[SEAL.]

In the United States Circuit Court of Appeals, Third Circuit.

MALONEY OIL & MANUFACTURING COMPANY, PETITIONER,
vs.
FEDERAL TRADE COMMISSION, RESPONDENT. } No. 2632.

Stipulation. (*Filed December 27, 1920.*)

Whereas, there are pending in the United States Circuit Court of Appeals, Third Circuit, certain petitions for review in the cases of the Gulf Refining Company *vs.* the Federal Trade Commission, No. 2609, The Standard Oil Company (New Jersey) *vs.* the Federal Trade Commission, No. 2599, and in the above-entitled cause, and there are pending in the Circuit Court of Appeals, Second Circuit, certain petitions for review in the cases of the Standard Oil Company of New York *vs.* the Federal Trade Commission, No. 111, and the Texas Company *vs.* the Federal Trade Commission, No. 3475; and

Whereas, the proceedings before the Commission, respondent herein, now subject to review as aforesaid, were consolidated, for the purpose of the taking of testimony, by order of the Commission, and as now pending, are alike in respect of the record testimony; and

Whereas, in the matter of the said petition of the Standard Oil Company of New York additional copies of the record are being printed for use in the said other cases, including that between the parties hereto; and

Whereas, both parties hereto are desirous of expediting the proceedings herein;

Now, therefore, it is hereby stipulated, by the parties through their respective attorneys, subject to the approval of the Court, that the transcript of the record in this cause may incorporate the testimony and evidence contained in the consolidated record aforesaid by reference only to the transcript in the record in the aforesaid case of the Standard Oil Company of New York *vs.* the Federal Trade Commission; and

It is further stipulated, that certain formal parts of the record as certified to the Clerk of the Court by respondent herein need not be printed, to wit, authorization for complaint; letter of service of copy of complaint upon the respondent below; order appointing examiner to take testimony; order appointing a substitute examiner; and notice of final hearing with acknowledgment of service thereof.

CHAMBERLIN & FULLER,
Attorneys for the Petitioner.
ADRIEN F. BUSICK,
Acting Chief Counsel for the Federal Trade Commission, Respondent.
E. W. BURR, *Attorney.*

In the United States Circuit Court of Appeals for the Third Circuit

MALONEY OIL & MANUFACTURING CO., PETITIONER,
vs.
FEDERAL TRADE COMMISSION, RESPONDENT.

No. 2632. March Term, 1921.

And afterwards, to wit, on the 4th day of October, 1921, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Victor B. Woolley, and Hon. J. Warren Davis, Circuit Judges, and Hon. Hugh M. Morris, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 14th day of July, 1922, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision

In the United States Circuit Court of Appeals for the Third Circuit.

STANDARD OIL COMPANY, PETITIONER, *vs.* FEDERAL TRADE COMMISSION, RESPONDENT.	No. 2599. October Term 1920.
GULF REFINING COMPANY, PETITIONER, *vs.* FEDERAL TRADE COMMISSION, RESPONDENT.	No. 2609. October Term 1920.
MALONEY OIL & MANUFACTURING CO., PETITIONER, *vs.* FEDERAL TRADE COMMISSION, RESPONDENT.	No. 2632. March Term 1921.

Separate petitions to set aside several orders of the Federal Trade Commission.

Before WOOLLEY and DAVIS, Circuit Judges, and MORRIS, District Judge. WOOLLEY, Circuit Judge. In these proceedings we are asked to review and set aside three orders of the Federal Trade Commission commanding the petitioning corporations forever to cease and desist from a practice found by the Commission to violate Section 5 of the Act creating the Federal Trade Commission (38 Stat. 717) and Section 3 of the Clayton Act. (38 Stat. 730.) The applicable provisions of these statutes are, in the first, "That unfair methods of competition in commerce are * * * unlawful," and, in the second, "That it shall be unlawful for any person engaged in commerce to lease * * * or make a sale * * * of goods, * * * machinery, * * * or other commodities * * * on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, * * * machinery, * * * or other commodities of * * * competitors of the lessor or seller, where the effect of such lease or sale, * * * or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

These are three of a large number of cases involving the same practice. They were tried in three groups. The testimony in one group bore most directly on gasoline marketing in states along the Atlantic seaboard. In another it related particularly to business done by companies within the State of Ohio. In the third it concerned business farther west. As the testimony in all cases was in the main identical, the twelve comprising the eastern group (which includes the cases at bar) were combined and heard together.

The testimony discloses a practice which has been widely pursued in the eastern part of the United States by corporations refining and marketing gasoline. It consists of what is practically a loan, or technically a lease without rental, by a wholesaler to a retailer, of equipment for the temporary storage, measurement and delivery of gasoline to the consuming public. The practice extends mainly

to the retailer whose place of business is referred to as a "curb filling station." The leased equipment is known as a "Curb pump outfit" and comprises a sunken tank for the storage of gasoline and a pump of familiar design by which gasoline is drawn from the tank and delivered to motor vehicles. The retailer is the proprietor of the station and is generally engaged in some other business. Typical of his class are keepers of country stores, residents in hamlets and at cross-roads, and farmers. The practice does not relate to retail stations owned and managed by the refining and marketing companies themselves. These are the more elaborate affairs also familiar to the public and generally known as "service stations." Proprietors of garages comprise an intermediate class of retailers to whom the practice in some measure extends.

The practice held by the Commission to offend against the statutes is found wholly within the terms of the leasing contracts. The form of the contract is important in two respects: First, in what the wholesaler requires the retailer to do; and second, in what it does not require him to do. The form of contract used by the Standard Oil Company is identical in substance with contracts used by the other petitioners. Paraphrased, it is as follows:

Reciting by preamble that the retailer is now purchasing gasoline from the wholesaler for sale to its customers and has requested it to install on his premises equipment for the better storage and handling of the gasoline so purchased, and that in compliance with his request the wholesaler is about to make the installation, it is agreed between them that the "equipment shall be used solely for the storage and handling of motor gasoline purchased by the" retailer from the wholesaler. Then follow undertakings by the retailer that he will maintain the equipment in good condition at his own cost; that he will not encumber or remove it or permit it to be seized or taken in execution; and that he will indemnify the wholesaler from liability for injuries occasioned by leakage, fire, or explosion of gasoline. The contract concludes with four provisions for its termination: First, upon the use of the equipment by the retailer for any other purpose than the storage and handling of gasoline purchased from the wholesaler; second, upon the retailer's failure for thirty days to purchase gasoline from the wholesaler; third, upon the sale of the premises by the retailer; and fourth, by either party upon five days' notice in writing to the other party; with the right of the wholesaler in any event to enter upon the premises and remove the equipment.

Having stated what the contract requires the retailer to do, the things which it does not require of him are equally important. The first is he is not required to pay any license fee, rental or other thing for the use of the equipment; nor is he restricted in his business to the equipment covered by the contract. On the contrary, he may use other equipment leased by competing wholesalers, or purchased by himself. Nor does the contract expressly tie him to the wholesaler's products. He may freely deal in gasoline or other petroleum

products purchased from competing wholesalers. He may not, however, use the equipment of the contract for storing and handling a competitor's gasoline.

In justification of their practice the petitioners maintain that the curb pump outfit is a natural development of the oil industry. In this industry the distribution and marketing of petroleum products more or less volatile and therefore more or less dangerous has always been a serious problem. The petitioners point out that for many years kerosene and other less volatile oils have been sold to retailers in barrels or direct to householders in cans. The barrels and cans being the property of the wholesaler are returned when the contents are removed. When the market for gasoline and more volatile oils developed, the wholesaler for safety shipped them to the retailer in steel barrels or drums. These also remained the property of the wholesaler and were returned when empty. With the marvelous increase of motor vehicles in all sections, urban and rural, there came a corresponding necessity for wider distribution of gasoline. Distribution from large central reservoirs to distant places by barrels and drums was no longer practicable. Then curb filling stations were established and curb pump outfits were installed whereby gasoline is delivered by tank trucks to many smaller centers and there stored and sold. These centers grew in number as the demand spread. At first this demand was met by one station and one outfit. As the demand increased stations and outfits were multiplied, the purpose of the practice, the petitioners claim, being to increase business by making easy and convenient the sale of gasoline to the public everywhere. But outfits cost money and the little storekeeper and the farmer by the roadside could not be induced, and frequently were not able, to invest capital in the purchase of an outfit. The result was that outfits were purchased by the wholesaler and loaned or leased to the retailer at practically no cost to him, yet upon the terms with respect to their use which we have detailed.

The view which the Federal Trade Commission takes of this practice is quite different. Its conclusions based on its findings of fact are that the installation of one outfit either supplies the needs of the retailer or meets the demand of his locality, and that, in consequence, the retailer has neither economic means nor personal desire to permit the installation of more than one outfit on his premises; that the contract for an outfit has the effect of tying the retailer to the products of the one wholesaler so long as one outfit meets the local demand and of substantially lessening competition by enabling the wholesaler to monopolize first one retailer and then, as the contracts are multiplied, to monopolize many thousand retailers, and eventually the whole territory in which they reside. Finding this practice of the petitioners violative of the laws referred to, the Commission entered the orders to cease and desist here under review.

On this statement of facts we shall discuss the practice as it bears on four classes of interested parties. The first of these is the public.

The Federal Trade Commission Act, in so far as proceedings th under are founded on a public interest, provides,

"* * * if it shall appear to the commission that a proceed by it in respect thereof would be to the interest of the public, it sh issue and serve upon such person, partnership, or corporation a co plaint stating its charges and in that respect, * * *." (38 S 719, sec. 5. F. T. C. *vs.* Gratz, 253 U. S. 421.)

The petitioners challenge the authority of the Federal Trade Co mission to institute and prosecute these proceedings on two groun as affecting the public interest. The first is, that the complaints not allege facts necessary to show that public interest is involv Upon taking this position there arose an issue whether public int est is a matter to be found by the Federal Trade Commission p liminary to the issuance of its complaints, or is a fact to be alleged the complaints and proved like any other fact. This question, view of the record, is purely academic, because whether public int est is to be regarded as a consideration moving the Commission action or a jurisdictional fact to be pleaded and proved in support its action, the fact of public interest in these cases is abundan established.

The law of unfair competition in its modern conception regards its chief concern the effect of forbidden acts upon consumers. T Congress in passing the Clayton Act and denouncing tying contra and leases obviously had in mind the public as the principal suffe therefrom. It is true, as said by Judge Denison in Steers *vs.* Uni States, 192 Fed. 1, in speaking of the Sherman Anti-Trust Act, Stat. 209, that the theory of injury to the public lies at the botto of the statutes and is directed against things which tend to depri the public of the advantages which flow from free competitio Having denounced methods of business which are unfair and whi substantially lessen competition and tend to create a monopoly, it clear that in a case of this kind the public is within the protection these statutes. If under these statutes the practice is illegal, then truth the public which pays the bill is the main sufferer. As t practice extends to many thousand retailers and comprehends mar million transactions through territory comprising more than half the population of the United States, it is idle to say that the publ has not an interest. Therefore, on this contention we think the pe tioners have wholly failed to grasp the principle and purpose of t statutes and are entirely wrong in their contention.

The next contention of the petitioners, however, is very differe It squarely meets the issue of public interest and is to the effect th the evidence fails to show that the public has been injured. Wi this we agree. Postponing discussion of the effect of the practi upon competition and monopoly, we do not find that the practice h increased the cost of distribution or has enhanced the price of gas line to the public. On the contrary, it has decreased the cost of di tribution. Whether the price to the public has been reduced, we c

not say. Clearly the public has found an advantage in the practice both in the matter of convenience and in the certainty of getting the precise make of gasoline advertised on the globe of the pump. On the other hand, if the orders of the Commission commanding the petitioners to cease and desist from the practice and thereafter to lease outfits to retailers only on remunerative rentals stand, the inevitable result will be that the number of curb filling stations will be reduced, thereby lessening the convenience to the public; or the rental charged the retailer for the outfit will be covered by fixing wholesale prices so as to allow him a larger profit. In the readjustment, the public doubtless will undergo its usual experience of paying higher prices.

The second class of parties interested in or affected by the practice is that of oil refiners or wholesalers, including both the petitioning wholesalers—the leading actors in the practice—and their wholesale competitors. The parts played by the members of this class depend for their legality upon the scope and purpose of the two statutes involved.

The first paragraph of each of the orders of the Commission does not deal with the restrictive clause of the contract; it deals solely with the leasing of outfits for a nominal rental or for no rental at all. One question decided by the Commission and here under review is whether this feature of the contract is an unfair method of competition within Section 5 of the Federal Trade Commission act. Interpreting this section, the Supreme Court, in Federal Trade Commission *vs.* Gratz, 253 U. S. 421, 427, said:

"The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The Act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

Therefore in determining, as matter of law, whether leasing of gasoline outfits without rentals is an unfair method of competition, we shall inquire whether the method is characterized by oppression of competitors or is against public policy because of its dangerous tendency unduly to hinder competition or create monopoly. So also under the Clayton Act, by force of which the Commission framed the second paragraph of each of its orders denouncing the restrictive clause of the contract, we shall, upon the authorities given below, make a similar inquiry with reference to the effect of the practice in lessening competition and creating a monopoly. To make clear the principle upon which we shall examine the testimony and decide these cases, it may be well to observe that the Clayton Act, which is a part of the scheme of laws against unlawful restraints and monopo-

lies, does not wait for its operation until monopolies have been created and restraints of trade established, but seeks to reach them in their incipiency and stop their growth. Yet, in thus avoiding an objectionable effect by removing the cause, the Congress did not intend the statute to reach every remote lessening of competition or every dim and uncertain tendency to monopoly. It intended rather that the Commission, and ultimately the courts, should inquire not whether a given practice may possibly lessen competition or possibly create a monopoly, but whether it probably lessens competition—and lessens it substantially—and whether it actually tends to create a monopoly. The Standard Fashion Company *vs.* Magrane-Houston Company, — U. S. Though differing somewhat from other laws, as we have indicated, the Clayton Act, nevertheless, deals with matters within the realm of monopoly. Therefore in determining whether given acts amount to unfair methods of competition within the meaning of the Federal Trade Commission Act, or substantially lessen competition and tend to create a monopoly within the meaning of the Clayton Act, the only standard of legality with which we are acquainted is the standard established by the Sherman Act in the words "restraint of trade or commerce" and "monopolize, or attempt to monopolize," and by the courts in construing the Sherman Act with reference to acts "which operate to the prejudice of the public interest by unduly restricting competition or unduly obstructing the due course of trade," and "restrict the common liberty to engage therein." Great Atlantic & Pacific Tea Co. *vs.* Cream of Wheat Co., 224 Fed. 566, 573; affirmed 227 Fed. 46; United States *vs.* American Tobacco Co., 221 U. S. 106, 179; United States *vs.* Patten, 226 U. S. 525, 541; Eastern States Lumber Asso. *vs.* United States, 234 U. S. 600, 613, 614; Standard Oil Case, 221 U. S. 1; Standard Fashion Company *vs.* Magrane-Houston Company, — U. S. —.

Applying this standard to the trade practice here involved, the first question, that of unfair method of competition, relates to the leasing of outfits without rentals.

Is this phase of the practice oppressive upon competitors and does it tend to create a monopoly? Concededly, a lease of a curb pump outfit without rental gives a wholesaler a trade advantage over its competitors. This alone is not unlawful, for such advantage is the object of all competition and is attained whenever one sells another goods of greater excellence or at lower prices than goods offered by others. Does this trade advantage contain the seeds of monopoly? It admittedly leaves competitors free to install competing outfits in the same locality and in all other localities. It also leaves every competitor free to place its outfit with the same retailer if it can prevail upon him by the ordinary competitive inducements of better goods, lower prices, and easier terms of credit. That the practice imposes upon a competitor the investment of more capital is an argument which would apply with equal force—and with equal infirmity—to competition based on superiority of goods and liberality of credit.

Under the Federal Trade Commission Act declaring unfair methods of competition unlawful—as the Act stood before the passage of the Clayton Act—a loan of a curb pump outfit without return or a lease without rental did not, we think, tend to create a monopoly, and, accordingly, was not, in our opinion, an unfair method of competition.

But the Clayton Act, when it came along, bore upon another phase of the contract, namely, upon the clause which restricts the use of the leased outfit to the product of the wholesaler, thereby, the Commission found, lessening competition and tending to create a monopoly. Such a clause of a contract, commonly known as a tying contract, is to be construed not by its terms alone but by its effect as well. The Act looks particularly to the consequences. In the United Shoe Machinery Corporation case, — U. S. —, the Supreme Court said:

"While the clauses enjoined do not contain specific agreements not to use the machinery of the competitor of the lessor, the practical effect of these drastic provisions is to prevent such use. We can entertain no doubt that such provisions as were enjoined are embraced in the broad terms of the Clayton Act which cover all conditions, agreements or understandings of this nature. That such restrictive and tying agreements must necessarily lessen competition and tend to monopoly, is, we believe, equally apparent * * *. This system of tying restrictions is quite as effective as express covenants could be and practically compels the use of the machine of the lessor except upon risks which the manufacturers will not willingly incur."

The point of similarity between the United Shoe Machinery Corporation case and the cases at bar is that, in both, the offending clauses did not expressly provide against the use of machinery or equipment of competitors. The difference between the contract clauses in the two cases is that as certain machinery of the United Shoe Machinery Corporation was essential to the lessee in his business, the practical effect of the clauses in that contract, although not specifically prohibiting the use of the machinery of a competitor, was absolutely to prevent its use; while the clause of the contract in the cases under consideration related to but one kind of machine or equipment, and extended to a situation which did not impose upon the lessee the necessity of obtaining something from the lessor which was indispensable in his business, the clause, in consequence, did not have the practical effect of preventing the use of equipment of a competitor.

Also, the cases at bar are distinguished from the Standard Fashion Company *vs.* Magrane-Houston Company, U. S., by the fact that the contract in that case contained an express agreement that the retailer should not sell or permit to be sold on his premises any other make of patterns. Here was a restrictive covenant which by its terms came within the third section of the Clayton Act. In discuss-

ing this clause the Supreme Court approved an observation in the opinion of the Circuit Court of Appeals, as follows:

"The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands, of small communities amount to giving such single pattern manufacturer a monopoly of the business in such community. Even in the larger cities, to limit to a single patternmaker the pattern business of dealers most resorted to by customers whose purchases tend to give fashions their vogue, may tend to facilitate further combination; so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business."

It has been suggested that this expression is apposite to the leasing contract here under discussion. But we think the cases are distinguished by the important fact that there the dealer was restricted by the contract to the sale of patterns of one manufacturer. This eliminated from his business all other patterns and tied him to the patterns of the contract. Here he is restricted in the use of the leased outfit to the storage and delivery of gasoline purchased from the lessor, but he is not limited to the use of one outfit, nor is he hampered in the sale of gasoline and other products of other manufacturers. The contract leaves every competitor free to persuade the retailer to install an additional outfit or to replace the outfit already installed by one of its own; and permits the retailer to yield if he chooses. While the effect of the restrictive clause of the contract in these cases may make competition somewhat more difficult because of the inclination of a satisfied retailer to stand by his wholesaler until another comes along and offers him something better, we are of opinion that the clause does not thereby lessen competition between wholesalers to the extent contemplated by the statute and that a tendency to monopolize the wholesale trade has not been disclosed. "That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial." Standard Fashion Company *vs.* Magrane-Houston Company, U. S.; Standard Oil Co. *vs.* F. T. C., 273 Fed. 478; Canfield Oil Co. *vs.* F. T. C., 274 Fed. 571; Sinclair Refining Co. *vs.* F. T. C., 276 Fed. 686.

The third class of parties interested in the practice is that of retailers.

Many retailers buy and own curb pump outfits. With these we have nothing to do except to note that by the practice of leasing outfits competition with them is greatly increased. We are concerned only with the retailer who has not money enough to purchase an outfit, or, having money, does not care to risk it. What happens? If his locality promises trade, one of the many wholesalers will supply him with an outfit without cost and without risk to him. The only condition imposed is that he shall not store and deliver through the outfit gasoline of any other wholesaler. The tying element in the transaction, if any there be, is the one arising from human nature and business sense, namely: that the retailer

will install no other outfit so long as he is satisfied with the quality and price of the wholesaler's gasoline and so long as one outfit serves his trade. The contract leaves him perfectly free to deal in all petroleum products made by competing wholesalers. He is at liberty to install, by lease or purchase, as many other outfits as he may choose and to sell through them as many brands of gasoline as he may desire. The leasing contract, being terminable by him at will on brief notice, permits him to change outfits at will, replacing one by another as often in the course of wholesalers' competition as he is induced to do so. The retailer, regarded in the aggregate, is an actor in the practice, who by reason of his number, place and interest causes competition between wholesalers to be increased rather than lessened. If the practice is abridged or abolished the retailer's risk is increased and his number diminished, and, correspondingly, competition is lessened. Certainly the retailer's part in the practice violates neither of the statutes. Nor, for the reasons given, can we think he is monopolized by the wholesaler, or the territory in which many retailers do business under the practice is monopolized.

The fourth class of parties claiming an interest in the practice is that of manufacturers of curb pump outfits. Of these there are a half dozen or more in the country, in none of which the petitioning corporations have an interest. The petitioning corporations do not manufacture pump outfits themselves but purchase them from manufacturers like anyone else. The Commission found as a fact that having purchased outfits, the petitioning corporations then leased them in competition with manufacturers engaged in the sale of like equipment in commerce, and upon this finding drew the conclusion, "That the practice of leasing such devices at a nominal rental * * * is an unfair method of competition in interstate commerce as against the competitors of respondents engaged in the manufacture of such devices, and in the sale of the same for profit, in the territory wherein the respondent leases such devices * * *."

After the manufacturer has sold equipments to the respondents without condition or limitation, and has turned them loose in commerce, we are at a loss to see just how he can be heard to complain that the equipment so sold and paid for is being leased by the owners on terms which make it difficult for him to sell like equipments to others. As there is involved here no question of fraud, deception, good conscience, or even business ethics, we should hesitate to follow business transactions to this length and determine whether conduct so remotely related to the original transaction of purchase is an unfair method of competition.

Having given these cases full and deliberate consideration, we are of opinion that, while the evidence supports some of the Commission's findings of fact as distinguished from the conclusions drawn from them,—it does not establish the offences laid in the complaints and founded on the statutes, and, accordingly, does not sustain the orders based thereon. Therefore, we are constrained to set aside the orders and direct that the complaints be dismissed.

MORRIS, District Judge, concurring in part and dissenting in part.

The operative parts of the order of the Commission here attacked are that the respondent forever cease and desist from:

"1. * * * leasing pumps or tanks or both and equipment for storing or handling petroleum products in furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of same after making due allowance for depreciation * * *.

"2. Entering into contracts or agreements with dealers in its petroleum products or from continuing to operate under any contract or agreement already entered into whereby such dealers agree or have an understanding that as a consideration for the leasing to them of such pumps and tanks and their equipment, the same shall be used only for storing or handling the products of respondent * * *."

The first paragraph of the order is directed only to the method of competition whereby the petitioners lease pumps and tanks to retailers at a nominal rental and is concerned not at all with the restrictive or tying clause of the lease. Divorced from the tying clause, leasing the pumps at a nominal rental is, in my opinion, a practice "never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression," nor is that practice against public policy as declared by the Sherman and Clayton Acts and, consequently, is not an unfair method of competition within Sec. 5 of the Trade Commission Act as interpreted by the Supreme Court in Federal Trade Commission *v.* Gratz, 253 U. S. 421, 427, even though the leasing of the pumps at a nominal rental may, perhaps, have a tendency to lessen competition either in the sale of pumps or in the sale of gasoline at wholesale. I am, therefore, in full accord with the views expressed by the majority of the Court with respect to the first paragraph of the Commission's order.

The second paragraph of the order rests upon Sec. 3 of the Clayton Act. While Sec. 5 of the Trade Commission Act provides "if it shall appear to the Commission that a proceeding by it * * * would be to the interest of the public, it shall issue," &c., no similar provision is found in the Clayton Act. In proceedings under that act public interest is as conclusively presumed as in a criminal proceeding and needs to be neither alleged nor proved. Consequently, as I see it, the petition for review presents with respect to the second paragraph of the order two questions only. First, whether the leases here involved are "on the condition, agreement or understanding that the lessee * * * shall not use or deal in the goods * * * merchandise * * * or other commodities of a competitor of the lessor" and, if so, then, second, whether "the effect of such lease, * * * condition, agreement or understanding may be to substantially lessen competition or tend to create monopoly in any line of commerce," both within the meaning of Sec. 3 of the Clayton Act. The leases contain the following provision:

"That the said equipment shall be used solely for the storage and handling of motor gasoline purchased by the party of the second part from the party of the first part for the purpose aforesaid."

While the foregoing clause does not contain a specific agreement not to use or deal in the gasoline of a competitor of the lessor, yet the clause falls within the terms of the Clayton Act if its practical effect is to prevent such use. United Shoe Machinery Corp'n, et al. v. The United States (decided April 17, 1922). Whether the practical effect of the restrictive agreement is to prevent the lessee from using or dealing in the gasoline of a competitor must be determined from the findings of the Commission and the evidence adduced before it, for under section 11 of the Clayton Act its findings of the fact are conclusive, if supported by the testimony. One of the findings of the Commission, supported by the testimony, is "that a small number of retail dealers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid, handle similar products of respondent's competitors, but a large majority of the retailers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid, require and use in their business only a single pump outfit." With respect to the one pump retailer the restrictive clause in the leases in question is as effective in preventing the lessee from using or dealing in the gasoline of a competitor of the lessor as if the lease expressly so provided. True, the lessee may terminate the lease at the time and under the conditions mentioned therein but that fact does not enable the tying clause to elude the prohibition of section 3 of the Clayton Act for that section operates with respect to short term leases and leases at will in like manner and with like force as it does with respect to long term leases or, for that matter, leases in perpetuity. The legality or illegality of the tying clause is dependent not at all upon the duration of the lease or the manner in which it may be terminated. It is likewise true that the lessee has the right to install another pump of his own or a pump of a competitor, but as his business does not warrant or require more than one pump he has not installed more than one and, consequently, his right is not a practical one but a mere abstract right. The result in my opinion is that in practice the restrictive clause of the leases in question has prevented and prevents a "single pump" lessee from using or dealing in gasoline of a competitor of the lessor just as effectively as if the lease had expressly so provided. Consequently, the lease falls within the prohibition of Sec. 3 of the Clayton Act if the effect of such lease "may be to substantially lessen competition or tend to create a monopoly" in selling gasoline at wholesale. Whether its effect may be to substantially lessen competition or tend to create a monopoly is our second question for consideration. The leases are now in force. The fact that they may be terminated at some future time is not relevant to the issue now under consideration. What has already been said shows that "a large majority of the retailers" require for use in their business only a single pump outfit and the prac-

tical effect of the restrictive covenant of the lease under which the operate is to prevent such large majority from using or dealing the gasoline of competitors of their respective lessors. Thereby competition among the wholesalers of gasoline has been and now restricted not with respect to an insignificant number of retailers but with respect to a large majority thereof and as effectually as the leases were in perpetuity and as if they expressly prohibited the lessee from using or dealing in the gasoline of the competitors of the respective lessors.

The petitioners have set us as a reason for the reversal of the Commission's order the excellence of the pump as a means for storing and delivering gasoline. But the Commission has not attacked the pump. On the contrary it admits the pump's many advantages and great utility. It denies, however, the right of the petitioners to make unlawful contracts with respect thereto or otherwise to use it as a means of stifling competition. The petitioners further urge that the restrictive clause is the only method by which they are enabled to use and adequately protect their trademark. Even if this contention were supported by the evidence it would be ineffective, for the petitioners are not at liberty to violate the law of the land whatever proper result may be the consequence of their so doing. The evidence, however, discloses that many pumps are owned by retailers, yet there is no evidence that the name of the gasoline being sold through such pumps is not exhibited in the same manner as it is on the leased pumps. Nor is there any evidence that in such cases the gasoline of one wholesaler has been sold as the gasoline of another. These last contentions of the petitioners are, in my judgment, wholly irrelevant to either of the two issues presented with respects to Sec. 3 of the Clayton Act. Again, the petitioners contend that by means of the leases in question the number of retailers has been substantially enlarged and competition thereby increased rather than lessened. If it be a fact that by means of the leases the number of retailers has been increased such increase was beyond question due to the nominal rental and not to the tying clause and the tying clause is none the less invalid even though accompanied by other clauses that are valid. Furthermore, each increase obtained by the nominal rental was simultaneously monopolized by the tying clause and competition thereby lessened and not increased.

Although not differing from the majority of the court as to the legal principles by which the correctness of the second paragraph of the Commission's order should be tested, yet I find myself not in full accord with their ultimate decision for the only conclusion that I am able to reach by applying those principles of law to the facts of these cases is that the effect of the restrictive covenant has been now is and so "may be" to substantially lessen competition: that the practical effect of the covenant is to prevent the "one pump" retailer from using or dealing in the gasoline of a competitor of the lessor and that, consequently, all "one pump" leases are in violation of Sec. 3 of the Clayton Act and invalid.

(Endorsements:) 2599. Opinion of the court by Woolley, J., and dissenting opinion by Morris, J. Received & filed Jul 14 1922. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit.

MALONEY OIL & MANUFACTURING CO., petitioner, *vs.* FEDERAL TRADE COMMISSION, respondent.	No. 2632. March Term, 1921.

Appeal from the Federal Trade Commission of the United States.

This cause came on to be heard on the transcript of record from the Federal Trade Commission of the United States and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the order of the said Federal Trade Commission in this cause be, and the same is hereby set aside, with direction, that the complaint be dismissed.

VICTOR B. WOOLLEY,
Circuit Judge.

PHILADELPHIA, *July 14th, 1922.*

(Endorsed:) No. 2632. Order setting aside order of Federal Trade Commission, etc. Received and filed, July 14th, 1922. Saunders Lewis, Jr., Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Federal Trade Commission of the United States, Greeting:

Whereas, lately before the Federal Trade Commission of the United States, before you or some of you, in a cause between The Maloney Oil and Manufacturing Company, (defendant below) petitioner, and the Federal Trade Commission, (plaintiff below) respondent, an order was entered by the said Federal Trade Commission against the Maloney Oil and Manufacturing Company, on the twenty-seventh day of April, 1920, which order is of record in the office of the said Federal Trade Commission, to which reference is hereby made, and the same is hereby expressly made a part hereof, as by the inspection of the transcript of the record of the said Federal Trade Commission which was brought into the United States Circuit Court of Appeals for the Third Circuit by virtue of a petition to review agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

And whereas, in the term of October, in the year of our Lord one thousand nine hundred and twenty-one, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the order of the said Federal Trade Commission in this cause be, and the same is hereby set aside, with direction, that the complaint be dismissed.

PHILADELPHIA, *July 14th, 1922.*

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said petition notwithstanding.

Witness, the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, at Philadelphia, the seventeenth day of August, in the year of our Lord one thousand nine hundred and twenty-two (1922).

SAUNDERS LEWIS, Jr.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

Original file No. 2632. U. S. Circuit Court of Appeals, Third Circuit. No. 5, October Term, 1921. Maloney Oil & Manufacturing Co., petitioner, *vs.* Federal Trade Commission, respondent. Copy of mandate.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, Third Judicial Circuit, Sct.

I, Saunders Lewis, Jr., clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original of Vol. I of record and proceedings in this court in the case of Maloney Oil & Manufacturing Co., petitioner, *vs.* Federal Trade Commission, respondent, on file and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 11th day of September, in the year of our Lord one thousand nine hundred and twenty-two and of the independence of the United States the one hundred and forty-seventh.

[SEAL.] SAUNDERS LEWIS, Jr.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

○

ADDITION TO RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 639.

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

MALONEY OIL AND MANUFACTURING COMPANY, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD DISTRICT.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

FEDERAL TRADE COMMISSION, PETITIONER,
vs.
MALONEY OIL & MANUFACTURING COMPANY, RESPONDENT. } No. 639.

STIPULATION.

Inasmuch as in certifying the record of the United States Circuit Court of Appeals for the Third Circuit in this case, the petition of the Maloney Oil & Manufacturing Company to the Circuit Court of Appeals for the Third Circuit for a review of the Commission's findings and order was omitted.

It is stipulated and agreed, by and between counsel for the respective parties, that printed copies of the said petition may be added to the record now before this court;

It is further stipulated and agreed that the attached is a true copy of the said petition.

JAMES M. BECK,
Solicitor General.
W. H. FULLER,
Chief Counsel, Federal Trade Commission,
Counsel for Petitioner.
CHARLES D. CHAMBERLIN,
HUBERT B. FULLER,
Counsel for Respondent.

United States Circuit Court of Appeals for the Third Circuit.

MALONEY OIL & MANUFACTURING COMPANY, a corporation, petitioner,
vs.
FEDERAL TRADE COMMISSIONER, RESPONDENT.

Petition to review order of Federal Trade Commission.

CHAMBERLIN & FULLER,
Attorneys for Petitioner,
823–26 Guardian Building, Cleveland, Ohio.

35461—23

United States Circuit Court of Appeals for the Third Circuit.

MALONEY OIL & MANUFACTURING COMPANY, a corporation, petitioner,
vs.
FEDERAL TRADE COMMISSION, RESPONDENT.

Petition to review order of Federal Trade Commission.

PETITION FOR REVIEW.

To the honorable judges of said court:

Your petitioner, the Maloney Oil & Manufacturing Company of Scranton, Pennsylvania, represents:

I.

That this petitioner is a citizen of the State of Pennsylvania, being a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, and being engaged in purchasing and selling petroleum and its products, with its principal office and place of business in Scranton, Pennsylvania, within the jurisdiction of the United States Circuit Court of Appeals for the Third Circuit.

II.

That respondent is a Commission appointed by the President of the United States, with the consent of the Senate, in accordance with an act of Congress approved September 26, 1914, duly organized and having its office at Washington, D. C., with powers as provided in said act.

III.

That on or about the 18th day of July, 1919, the said respondent issued and served upon this petitioner a certain formal complaint, charging this petitioner with the violation of the provisions of an act of Congress approved September 26, 1914, entitled "An act to create the Federal Trade Commission, define its powers and duties and for other purposes," and particularly section 5 (five) thereof, and also with the violation of the provisions of section 2 (two) and 3 (three) of a certain act of Congress approved October 15th, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies and for other purposes" and more generally known as the Clayton Act.

IV.

That your petitioner answered said complaint, denying the allegations of violation of said acts set forth in said complaint.

V.

That thereafter, respondent set the matter for hearing and made a record of the testimony adduced on the part of both parties to the proceeding, including the testimony of many other respondents, and

entered into certain stipulations, all of which are set forth in the record of the case.

VI.

That respondent made from such record of testimony, including the stipulations aforesaid, an alleged report and findings and conclusions thereon, known as its Docket No. 309, and on the 27th day of April, 1920, at a regular session of said Commission in the said Docket No. 309 it entered a pretended order to cease and desist, which order it served upon this petitioner by mailing a copy thereof on or about the 29th day of May, 1920, a copy of said order being as follows:

"It is ordered, that the respondent, Maloney Oil & Manufacturing Company, forever cease and desist from:

"1. Directly or indirectly leasing pumps or tanks or both and equipment for storing or handling petroleum products in furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of same after making due allowance for depreciation and other items usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom, and from doing any matter or thing which would have the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made.

"2. Entering into contracts or agreements with dealers in its petroleum products or from continuing to operate under any contract or agreement already entered into whereby such dealers agree or have an understanding that as a consideration for the leasing to them of such pumps and tanks and their equipment the same shall be used only for storing or handling the products of respondent, and from doing anything having the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made.

"Provided, however, that as to such pumps and tanks and equipments as are now leased by respondent contrary to the provisions of this order, respondent shall be required four months from the date of service hereof to enter into new contracts or agreements with respect to same which shall not be incompatible with the purport and intent of this order.

"It is also ordered, under and by virtue of the authority conferred on the Commission by Paragraph B of section 6 of 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914, that the said Maloney Oil and Manufacturing Company, respondent, shall within 30 days after the expiration of the time allowed for the respondent to comply with this order to cease and desist, report in writing to the Federal Trade Commission, fully stating and setting forth the nature of the charges made in the conduct of its business with respect to such matter involved in the order to cease and desist, and shall set forth in such report in complete detail the plan or plans adopted for the lease, loan, gift, or sale of any oil tanks and pumps for use in

storing refined oil or gasoline; what plan or plans are in use or are proposed to be put in use, and also attached to such report any contracts used by the respondent in the conduct of such business.

"Dated at Washington, D. C., this 27th day of April, A. D. 1920."

By the Commission:

[SEAL.] J. P. YODER,
Secretary.

VII.

That this petitioner feels aggrieved at the order issued by said respondent herein and served upon said petitioner as aforesaid and alleges that this respondent was without jurisdiction to issue said complaint hereinbefore referred to and was without jurisdiction to issue said order commanding this petitioner to cease and desist as aforesaid as is shown by the facts and evidence of record and the petitioner further alleges that said order is unlawful and that the findings and conclusions on which said order was based are without support, either in law or in fact, and your petitioner seeks a review thereof by this honorable court.

Wherefore your petitioner prays that this court review said order and that upon the final hearing of this case it be ordered and decreed that the said order of the Federal Trade Commission hereinbefore referred to, issued upon the 27th day of April, 1920, and served upon this petitioner as aforesaid, as shown in the docket of said Commission, Docket No. 309, requiring this petitioner to cease and desist from the doing of certain things, be held to be null, void and of no effect and that it be reversed and set aside, and that this petitioner be granted such other and further relief as to this Court may seem just and proper.

And your petitioner will ever pray.

MALONEY OIL & MANUFACTURING COMPANY,
By M. W. COLLINS.

CHAMBERLIN & FULLER,
Attorneys for Petitioner,
823-26 Guardian Building, Cleveland, Ohio.

STATE OF PENNSYLVANIA,
County of Lackawanna, ss:

M. W. Collins, being duly sworn, deposes and says that he is vice president of the Maloney Oil and Manufacturing Company, a corporation and the petitioner herein; that he has read the foregoing petition and that the facts stated therein are true to the best of his knowledge, information and belief.

M. W. COLLINS.

Sworn and subscribed to before me, a notary public in and for said county, this 15th day of November, A. D. 1920.

[SEAL.] FRANK L. MARTIN,
Notary Public.

My commission expires April 1st, 1923.

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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

FEDERAL TRADE COMMISSION, petitioner,
v.
SINCLAIR REFINING COMPANY, respondent.
No. 213.

FEDERAL TRADE COMMISSION, petitioner,
v.
STANDARD OIL COMPANY (NEW JERSEY), respondent.
No. 637.

FEDERAL TRADE COMMISSION, petitioner,
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GULF REFINING COMPANY, respondent.
No. 638.

FEDERAL TRADE COMMISSION, petitioner,
v.
MALONEY OIL & MFG. COMPANY, respondent.
No. 639.

BRIEF FOR PETITIONER.

STATEMENT.

These cases come to this court on writs of certiorari to review judgments of the Circuit Court of Appeals for the Third Circuit and Circuit Court of Appeals for the Seventh Circuit, which judgments set aside orders of the Federal Trade Commission requiring these respondents, refiners, and/or wholesale marketers of gasoline, to cease and desist from leasing to retail dealers underground tanks with pumps for storing and dispensing gasoline for a nominal consideration and with covenant that the equipment should be used only for storing and selling gasoline purchased from the respondents and from continuing to operate under such leases outstanding.

The cases at bar were four out of more than thirty similar proceedings instituted and prosecuted practically simultaneously by the Commission for the purpose of determining the legality of the practice involved. In approximately thirty of these proceedings orders practically identical with those entered in the cases at bar were issued.

Effect of consolidation of cases on the record before the court.

These cases comprise four of a considerable group of proceedings by the Federal Trade Commission, involving the same practice to be described below.

Testimony in the entire number of cases was taken in three groups, one of which bore most directly upon gasoline marketing companies, respondents before the Commission, in the States along the Atlantic seaboard. Another group related most directly to respondents doing business within the State of Ohio, and the third group concerned respondents doing business in territory farther West.

As regards the cases in what might be called the eastern group, of which the notice of hearing was duly given to the three respondents in the cases coming from the Third Circuit, the Commission entered an order for the combination of some twelve cases. This was for the reason that the evidence in support of the Commission's complaints would be, in most respects, identical, and for the purpose of securing expedition. (Maloney Rec., Vol. I, p. 17.) [1]

At the opening of the taking of testimony upon the group of twelve cases, to which the three cases before the court from the Third Circuit belonged, it was clearly understood that the testimony as regards the practice and its effect upon competition would be applicable against all of the various oil companies belonging to that group. Questions, however, of the interstate character of the competition and con-

[1] In referring to the records in this brief the following abbreviations will be used: "Standard Rec., Vol. I, Vol. II, Vol. III" refers to record Standard Oil Company of New Jersey, Volume I, etc.; "Gulf Rec., Vol. I, Vol. II" refers to record Gulf Refining Company, Volume I, etc.; "Maloney Rec., Vol. I, Vol. II" refers to record Maloney Oil & Mfg. Company, Volume I, etc.; "Sinclair Rec." refers to the record in the Sinclair case.

sequent jurisdiction of the Commission were to be covered by stipulation or special testimony. (Standard Rec., Vol. II, pp. 5, 7.)

Counsel then present proceeded with the hearing without objection to this plan, and at the close of the hearing counsel for certain of the respondents then before the Commission, including the Standard Oil Company of New Jersey, moved to augment the record of the eastern group of cases by the incorporation of the testimony previously taken in the Ohio group of cases. (Standard Rec., Vol. II, pp. 604, 605.) The sole ground for such action was that evidence for or against the practice was applicable for or against all companies employing it.

It is clear, therefore, that all evidence in Volumes II and III of the record before the court coming from the Third Circuit, pertaining to the effects of the practice, is applicable against the Standard Oil Company of New Jersey. The Maloney Oil & Mfg. Company and Gulf Refining Company were not represented when the motion was made before the Commission to add the testimony in the Ohio record to that taken in the eastern group of cases, and they were therefore not included in the favorable action by the Commission on that motion. Hence Volume III of the record before the court from the Third Circuit is not a part of the Maloney and Gulf Refining cases.

The record in the Sinclair Refining case, coming from the Seventh Circuit, stands alone so far as that company is concerned.

The practice in question.

The cases at bar relate solely to the legality of a practice which has been widely indulged in throughout the eastern one-third of the United States by corporations refining and/or marketing gasoline at wholesale. The practice consists in the leasing to retail dealers in gasoline, for a nominal consideration, of equipment for the storage, measurement, and delivery of gasoline to the consumer. The leases are written, run in favor of the retail dealer, and contain a covenant restricting the lessee to the use, in the equipment leased, of the products of the leasing corporation solely. The provision objected to is that by which the parties agree that:

> The lessee or borrower shall not place in such devices or use in connection with such devices or their equipments (referring to the pump and tank equipment) any refined oil or gasoline of a competitor.

The record shows without contradiction that the practice has not been indulged in in the western half of the United States nor to any great extent west of the State of Ohio.

Inasmuch as the complaint, the evidence, and the findings are all to the effect that the lessees, except large garagemen in the more populous towns and cities, will not be encumbered with, and as a matter of fact do not have, more than one equipment, we shall show that the practical effect of the restrictive provision above quoted is an absolute restriction of this great class of dealers to the sale of the products of the leasing corporation.

The oil companies differ respecting the fairness or desirability of the practice.

At the outset it may be well to state that the oil companies, great and small, are divided in opinion respecting the fairness or desirability of the leasing practice with restrictive covenant.

Respondent, Maloney Oil & Mfg. Company, is among those who condemn the practice, having stated in its answer that the company "is now and always has been opposed to furnishing dealers or users the tanks and pumps, and has only done so in a few cases to meet competition, and if it is within your power and that (sic) you will enjoin *all concerns* from continuing the practice, we shall be glad to observe the order in letter and spirit." In passing, it may be said that similar disapproval of the practice was expressed by some of the five independent oil companies of Ohio, who petitioned for review of the Commission's order with regard to the present practice.

The Standard Oil Company of Indiana, the largest of the Standard Oil companies, doing business in the States of Indiana, Illinois, Michigan, Wisconsin, Missouri, Iowa, Minnesota, North Dakota, South Dakota, and Kansas, through its general manager of sales, gave testimony that his company had adopted exclusive leasing "in self-defense" to meet the practice as employed by competitors, and after full investigation had found "that the practice has been and is contrary to the judgment of

the sales managers of respondent and is in their judgment bad merchandising." (Sinclair Rec., p. 107.) This company abandoned the practice under order of the Federal Trade Commission. (Sinclair Rec., p. 106.)

The Atlantic Refining Company, one of the most powerful of the Standard Oil group, doing business in the States of Pennsylvania and Delaware, employs the exclusive leasing system to the least extent practicable, in view of the use of the practice by their competitors. They prefer to sell the dealers the equipment (Standard Rec., Vol. II, pp. 584, 588), and do sell it four times out of five (Standard Rec., Vol. II, pp. 560, 590), and would sell the fifth but that the dealer knows he can secure an equipment gratuitously from a competitor. (Standard Rec., Vol. II, p. 560.)

Since as shown elsewhere in this brief (post p. 20) the system is employed very little, if at all, between the Mississippi River and the Rockies, it is clear that great Standard Oil concerns occupying the western parts of the country, such as the Standard Oil of Nebraska, the Standard Oil of Louisiana, the Standard Oil of Kentucky, the Magnolia Petroleum Company, the Continental Oil Company, and the Standard Oil of California, as well as independents, do not engage much, if at all, in the exclusive leasing practice.

The general manager of the National Refining Company, one of the largest independents (Standard Rec., Vol. III, p. 297), doing business in fifteen

States in the middle west (Id., Vol. III, pp. 289, 290; Sinclair Rec., p. 90), declared that his company does not practice the leasing of equipment (Sinclair Rec., p. 92) and that the practice is "an undesirable practice and mighty poor merchandising." (Standard Rec., Vol. III, p. 292.)

The Indian Refining Company, a large independent, doing business in practically all of the States of the United States east of the Mississippi (Vol. II, p. 8), highly disapproved the practice as "buying a man's business." (Standard Rec., Vol. II, p. 15.)

It is evident that many, if not the majority, of the great companies of both the Standard Oil and the independent groups are in dissent as to the practice, and such fact tends inevitably to the conclusion that the great benefits to the public set up by respondents herein (see our argument, post pp. 52-65) are inherent, not in the leasing of modern equipment with exclusive covenant but in the employment of modern equipment irrespective of its ownership.

The small companies, in so far as their testimony has been secured in this proceeding, are still more generally opposed to the practice.

I.

THE FACTS.

1. Introductory.

Gasoline and other petroleum products are sold at wholesale by two classes of companies, (1) refining companies which produce crude and/or purchase it from producers and refine it, and (2) wholesale concerns which purchase refined products from refining companies. Both classes of companies market gasoline to three classes of customers: First, direct to the consuming public through what are commonly called "filling stations" or "service stations"—large depots for the sale of gasoline, lubricants, or other petroleum products; second, to public garages which sell gasoline and lubricants as a part of their business; finally, both refiners and wholesale dealers sell gasoline to retail dealers, proprietors of "curb stations," who sell it to the operators of motor vehicles. This last class of customers constitutes the principal market of all concerns selling gasoline at wholesale.

The instant cases are not concerned with sales direct by refiners or wholesalers to consumers through filling or service stations. The cases do involve to some extent leases of the equipment of the character hereinafter described to public garage owners; but they deal primarily with competition for the business of the small retailers—the many thousands of proprietors of "curb pump stations."

Gasoline, kerosene, and kindred products were for many years shipped by rail or water from the

refiner and wholesaler to retail dealers in wooden barrels, steel barrels, or drums, in which the dealers usually retained such products until sold, when the containers were returned to the seller. With the enormous increase in consumption of gasoline, particularly in the last fifteen years, due to increase in population and to the use of motor vehicles, it has come to pass that the methods of distribution by the refiner and wholesaler, as well as the method of storage and sale by the retailer, have changed. The wholesaler, whether refiner or wholesale dealer only, delivers his product to the retailer in large part by tank wagons, very largely motor-driven. The retailer has substituted for the barrel and drum as a storage container an underground tank of from 250 gallons to 1,000 gallons capacity with a pump attached, which measures the gas as it is thereby forced from the storage tank into the customer's motor. These devices for storing and measuring gasoline were originated and placed on the market by manufacturers of equipment of this character, of which there are a number, some of them corporations with large business and substantial capital. Such devices had been sold in large numbers to retailers of gasoline and were in very general use before the practice here complained of was adopted by the respondent companies, or by other oil companies.

Within very recent years, principally the five years last preceding the institution by the Commission of proceedings in these cases, certain of

the gasoline companies, both refiners and wholesale dealers, selling gasoline at wholesale, conspicuously the great refining companies, have engaged in the practice heretofore outlined of leasing to the individual retailer, for a nominal consideration, a tank and pump outfit for the storage and measuring of gasoline, upon the agreement expressed in the lease that such outfit shall be used only for the storage and sale of gasoline purchased from the lessor. These leases have been entered into both with existing dealers and with persons just entering the business. The proportion of established dealers placed under such lease does not appear from the record, but it is fairly clear that thousands of both established and new dealers have been tied up.

2. Number of leases outstanding in the names of respondents.

The respondent, Standard Oil Company of New Jersey, at the time the testimony was taken, had outstanding 5,500 such leases in the territory in which it sells, comprising the States of New Jersey, Maryland, Virginia, West Virginia, and North and South Carolina. (Standard Rec., Vol. II, p. 199.) The investment in this installation amounted to $1,300,000 (id., p. 493), or an average of approximately $236.36 for each leased equipment. The exact number of retail dealers in gasoline doing business in the territory of the Standard Oil Company of New Jersey is not given in the record, but a fair approximation of the number may be arrived at. The general manager of the Atlantic Refining Com-

pany, that member of the Old Standard Oil combination which does business in the States of Pennsylvania and Delaware, testified that 10,000 "is pretty nearly the total of all distributors of gasoline in the States of Pennsylvania and Delaware. (Standard Rec., Vol. II, p. 550.) Conceding that the number of retail dealers in proportion to population is the same in the six States in which the Standard Oil Company of New Jersey does business, there would be approximately 12,700 dealers in those States.[2] This estimate may not be correct, but if not the error is by way of overestimate, since there are probably more retail dealers in gasoline per thousand of population in Delaware and Pennsylvania than in the States of New Jersey, Maryland, Virginia, West Virginia, and North and South Carolina. It appears, therefore, that of approximately 12,700 retail dealers in these six States the respondent, Standard Oil Company of New Jersey, has leases of the character herein complained of with 5,500.

The number of leases outstanding in the name of the respondent, Maloney Oil & Manufacturing Company, is small; and the exact number of leases outstanding in the name of the respondent, Gulf Refining Company, is not proven, but the company's answer to the Commission's complaint admits the general adoption of the practice and its widespread employment by the company. (Gulf Rec., Vol. I, pp. 13, 14.)

[2] The Census shows the population of Pennsylvania to be 8,720,017 and of Delaware 223,003, or a total for the two States of 8,943,000, while the population of the six States in which the Standard Oil Company of New Jersey does business are as follows: New Jersey, 3,155,900; Maryland, 1,449,661; Virginia, 2,309,187; West Virginia, 1,463,701; North Carolina 2,559,123; South Carolina, 1,683,724; total, 12,621,296.

The Sinclair Company has outstanding 459 such leases scattered over 18 States. (Sinclair Rec., p. 138.) Since it is the method of competition involved in such leases which is on trial, it may be here noted that the Standard Oil Company of New York, which was one of the respondents in the proceedings before the Commission, has outstanding in New York and the New England States approximately 8,000 such leases. The Commission's order against this company was set aside by the Circuit Court of Appeals for the Second Circuit.

The extent to which the practice has been resorted to by particular companies is shown also by the percentage of their gasoline business done under leases containing the restrictive covenant. As early as 1916, 48.9 per cent of the entire gasoline trade of the Standard Oil Company of New York was with lessees of equipment, and with the restrictive covenant, and 68 per cent of the business with the automobile trade was done with such lessees. (Standard Rec., Vol. II, pp. 522, 545.) Of the trade of the Texas Company 60 to 65 per cent is with the same class of customers. (Standard Rec., Vol. II, pp. 459, 461.) The great bulk of the business of the Standard Oil Company of New Jersey is of the same kind. (Standard Rec., Vol. II, p. 498.)

The Standard Oil Company of New York has a practical monopoly throughout Vermont and New Hampshire (Standard Rec., Vol. II, pp. 111, 112, 113), and also clearly controls the market adjacent to New

York City. (Standard Rec., Vol. II, p. 245.) There is also recognition in the record of the arrival of the stage bordering on monopoly in that section. (Standard Rec., Vol. II, pp. 514, 515.)

3. All dealers in some communities under restrictive covenant.

Not only has the respondent, Standard Oil Company of New Jersey, a large percentage of the retail dealers in the territory served by it under these leases, but it also appears that in some communities approximately all of the retail dealers have been placed under such contracts, either by the respondents or by other companies. The manager of distribution of the Indian Refining Company, which markets in States east of the Mississippi River, estimates that in the large cities in his company's territory from 60 to 75 per cent of the retail dealers in gasoline have equipments installed under leases in which the restrictive covenant complained of is found, while in the outlying towns probably not to exceed 25 per cent of the retail dealers are under such leases. (Standard Rec., Vol. II, p. 49.) Another witness testified that 75 to 85 per cent of the outfits in his district were loaned under restrictive covenants (Standard Rec., Vol. II, p. 61); another wholesale marketer believed that the proportion of leases would amount to 80 or 90 per cent (Standard Rec., Vol. II, p. 436); still another testified that in his territory 50 per cent of the dealers were under such contracts. The effect has been

practically to exclude companies not making such leases from certain territory. (Standard Rec., Vol. II, p. 375.) A representative of the Indian Refining Company, one of the large independent wholesale distributors, testified:

> A. We could pick out some few centers where we could say that we practically do not to-day sell a single garage man where we did, at one time, have a nice business.
>
> Q. Was the decrease in your business there due to this practice?
>
> A. Oh, absolutely. I want to say right here, in speaking about volume of business, my statement that our business had increased, I do not mean that it had necessarily increased, in the places where this practice has been followed, but I mean that our total business had increased, despite this policy, which meant that when you lose it in one place you have got to get it in another. . . . I know of one town in North Carolina where, when we went in there, I would say ten years ago, we secured a fair volume of business, which has gradually dwindled down to where I think we to-day have practically nothing in the way of business with the garage men.
>
> Q. Do you know why?
>
> A. On account of the giving of these tanks (Standard Rec., Vol. II, pp. 52, 53.)

4. The individual retailer requires but one set of equipment.

The Commission's complaint in each of the instant cases charged, and the Commission found as a fact, that in the vast majority of instances the retail dealer has use for but one set of equipment for the storage and sale of gasoline. The Commission's finding on this point in each case is as follows:

> That a small number of retail dealers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid handle similar products of respondent's competitors, but a large majority of the retailers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid require and use in their business only a single pump outfit. (Findings, par. 5; Standard Rec., Vol. I, pp. 27–28; Maloney Rec., Vol. 1, pp. 26–27; Gulf Rec., Vol. I, pp. 26–27.)

The evidence in support of the Commission's findings on this point is overwhelming. (Standard Rec., Vol. II, pp. 179, 180, 184, 185, 113, 344, 358; Vol. III, pp. 42, 43, 290, 291.)

5. Leases prevent any competition for business of retail dealers.

The effect of the restrictive covenant in the leases is to prevent gasoline marketers other than the lessor from selling or even soliciting the business of the dealer. The following excerpts from the testimony amply support this:

A. It seems to me if the owner of each equipment would own the equipment, naturally I would have a chance at it, no matter who sells it to him, but, at one time or another, I could probably get around him and get some of his trade; but by being tied up to another company, of course, I stand no chance to sell him any except these equipments that I put out myself. (Standard Rec., Vol. II, p. 224.)

A. Well, there is another phase of that enters into it, and that is, they use the equipment, once they have it in, as an intimidation whereby to hold their trade. For instance, a garage man might be persuaded to install the Standard Oil equipment practically free and later on have a change of heart and want to come over to an independent, and the Standard Oil Company, by reason of their lease, could either rip his tank and pump out, at considerable inconvenience to the garage man, or the cost price of the equipment might be due the moment they put another company's gasoline in their tanks, and their accounts could be trusteed, I suppose, and cause the garage man considerable trouble. (Standard Rec., Vol. II, pp. 237–238.)

A. But if you can get in a new pump there it pleases him, and he will tie up with you and you will get his business. The old pump belonged to himself and everybody had a shot at his business, but the concern that goes in and puts in a new pump, nobody gets his business but they. (Standard Rec., Vol. II, pp. 334–335.)

Q. Have you ever tried to sell your product to a garage where there is a lease and loan installation?

A. Yes, sir; we have.

Q. Have you ever been successful along that line?

A. No, sir; not in any permanent way. Sometimes they would buy of us if they were neglected and out of gasoline from the parties that they had the contract with. (Standard Rec., Vol. II, p. 344.)

Q. And, in fact, is not the very purpose of these contracts to control the business of the company, the retailer, with whom you put in your leased equipment, to such an extent that if you did not think you could control his business by placing such an equipment under such a contract you would not place the equipment at all?

A. Yes. (Standard Rec., Vol. II, p. 367.)

Q. Why don't you think it is a good business practice, Mr. Talbot, to furnish the pump for the purpose of getting a customer for your gas?

A. I don't think it is either good for ourselves or anyone else. It is monopolizing that particular customer. (Standard Rec., Vol. III, p. 18.) I think if no other oil company loaned pumps and we did loan it we would get more business if we did loan them.

Q. Then in that case that advantage would come from the monopoly you would derive?

A. Yes.

Q. So that one of the reasons for leasing and loaning these pumps is that you thereby monopolize the business of your customer?

A. Sure; that is one of the reasons. (Standard Rec., Vol. III, p. 65.)

Q. So you do it (i. e., loan equipment) because in that way you are enabled to get a corner on your customers and hold your gallonage up?

A. We feel it is fair to him to do that.

Q. No; you do not answer my question.

A. I do not know that I got your question. (Question read.)

A. We do it to hold our gallonage up.

Q. And if you could not retain your customer by entering into these tying arrangements with him so that he is compelled to buy from you, you feel that you should lose your gallonage?

A. We would have to take other means to get the gallonage.

Q. If you will just answer my questions——

A. Well, yes. (Standard Rec., Vol. III, pp. 101–102.)

The dealer's purchases are effectively controlled by the lessor while the lease is in force, and as thousands of such leases are outstanding in the name of the respondent companies the business of thousands of such dealers is monopolized.

6. The covenant restricts also competition in kerosene and lubricating oils.

While the covenant in the contract restricting the dealer to the lessor's goods is in terms limited to gasoline, its practical effect is to carry with it also the business in lubricating and illuminating oils. (Standard Rec., Vol. II, pp. 322–323, 106, 111, 112, 172, 261, 298–299, 325, 345.) The business in lubricants affords a far larger margin of profit than the gasoline business and is very valuable in itself.

7. The practice of leasing with restricting covenant confined largely to the eastern portion of the United States.

The leasing of tank and pump outfits, with the covenants for exclusive use, is a practice which has not been developed to any extent in the great territory lying between the Mississippi River and the Rocky Mountains. (Standard Rec., Vol. II, pp. 454, 462; Vol. III, p. 241.) Equipment of this character is very largely in use, but not leased for a nominal consideration and with covenant restricting its use to the sale of gasoline purchased from the lessor.

8. Effect of the practice on manufacturers of equipment.

There are a number of companies whose business consists in the manufacture and sale in interstate commerce of equipment of the character leased by respondents upon nominal consideration. These equipment companies originally created the demand

among retail dealers for equipment of this character, and they were selling large quantities of it before the practice of leasing or loaning it was instituted by oil companies. The effect of the use of this practice by the oil companies has been greatly to injure the business of the companies engaged in the manufacture and sale of equipment. In some territories where the leasing and loaning practice has been vigorously pushed by the oil companies the equipment companies have been practically driven from the business. (Standard Rec., Vol. II, p. 154; id., p. 243; Vol. II, pp. 111, 124, 129, 142, 143, 145, 148, 315.) Obviously no equipment companies selling these tank and pump outfits can compete with the oil companies leasing or loaning them practically without consideration. In so far as the oil companies purchase this equipment direct from the manufacturers the practice may have little effect upon their business, since it is immaterial to a manufacturer of equipment whether he sells to the retailer or to the refiner or wholesaler of gasoline. But where, as in the case of respondent Standard Oil Company of New Jersey, the leasing company also manufactures, through a company which it controls by stock ownership or otherwise, the equipment which it leases, manifestly the equipment companies can not sell equipment to the retail dealers in competition with the oil-refining companies loaning or leasing it without consideration.

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II.

ERRORS RELIED ON.

The Circuit Court of Appeals for the Third Circuit erred—

1. In holding that enhancement of the prices of gasoline as a result of the practice complained of must be proven before the practice may be held to injure the public;

2. In holding that the practice complained of has decreased the cost of distributing gasoline;

3. In holding that the practice is necessary to insure the public getting the precise make of gasoline advertised on the pump globe;

4. In holding that if the Commission's order be sustained the inevitable result will be to reduce the number of curb pump stations;

5. In holding that in determining whether given acts amount to unfair methods of competition because of their dangerous tendency unduly to hinder competition or create monopoly, or whether the acts substantially lessen competition or tend to create monopoly within the meaning of section 3 of the Clayton Act, the standard of legality to be applied is that established by the Sherman Antitrust Act in the words "restraint of trade or commerce" and "monopolize or attempt to monopolize";

6. In holding that leasing a curb pump outfit at a nominal rental is not oppressive to competitors, and therefor not an unfair method of competition;

7. In holding that when a wholesale distributor of gasoline leases a curb pump outfit to a retailer it leaves competitors free to install competing outfits (*a*) in the same locality and (*b*) with the same retailer;

8. In holding that the practical effect of the restrictive covenant in the leases is not to prevent the use by the retailer of the equipment of a competitor of the lessor, nor to prevent the retail dealer from purchasing gasoline from competitors of the lessor;

9. In not holding that the effect of the leases with the restrictive covenant is to substantially lessen competition and to tend to create monopoly in the sale of gasoline and other petroleum products *at wholesale* and in the sale of pump outfits;

10. In holding that the restrictive covenant leaves the retail dealer free to deal in all petroleum products of competitors of the refiner or wholesaler making the lease;

11. In holding that because the lease may be terminated by the retailer on brief notice, the effect thereof is not to substantially lessen competition or tend to create monopoly;

The Circuit Court of Appeals for the Seventh Circuit erred—

1. In holding that the practice may not be held to be an unfair method of competition unless it amounts to a fraud upon some public or private right;

2. In not holding that methods of competition which have a dangerous tendency unduly to hinder competition are unfair within the meaning of the statute, though the element of fraud be entirely absent;

3. In holding that the leasing of tank and pump equipment at a nominal rental is not an unfair method of competition as against manufacturers of this equipment;

4. In holding that the equipment is not leased upon the condition that the dealer shall not sell the products of a competitor of the lessor, though the Commission found that only a small proportion of dealers require or use more than one such equipment;

5. In holding that the Commission's order fixed or regulated the rentals of equipment;

6. In failing to distinguish between the leasing of equipment upon a nominal consideration for the purpose and with the effect of suppressing competition in the sale of gasoline, and the usual and ordinary case of a lease of real or personal property with limitations upon the use of the property which do not accomplish an unlawful end;

7. In holding that some 430 retail dealers, parties to the leases, were necessary parties respondent to the Commission's complaint.

III.

THE LAW ON THE MERITS.

The violation of the Clayton Act.

Section 3 of the Clayton Act is as follows:

> SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

An analysis of this section reveals that it prohibits (1) leases and sales, or contracts for sale, (2) the fixing of a price, (3) the making of a rebate from the price, (4) the making of a discount from the price, on the condition, agreement, or understanding that the lessee or purchaser shall not use or deal in the goods, etc., of a competitior or competitors, where the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

In the instant case, therefore, three points must be established in order to show a violation of this section: (1) That the respondents have made leases, (2) upon the condition that the lessee shall not deal in the goods of a competitor or competitors, and (3) that the effect of such leases may be to substantially lessen competition or tend to create a monopoly.

1. RESPONDENTS' OUTFITS ARE LEASED.

Respondents have not thus far in these cases contended that their outfits are not "leased" within the meaning of the statute. Thus the presence of one element in establishing a violation of the act need not be discussed.

2. RESPONDENTS' LEASES ARE UPON THE CONDITION THAT THE DEALERS SHALL NOT DEAL IN GASOLINE OF COMPETING REFINERS OR WHOLESALERS.

Respondents contend, and the courts below held, that the condition in respondents' leases that the leased equipment shall not be used for the storage and sale of gasoline purchased from others than the lessor is not a condition that the lessee shall not deal in the products of a competitor or competitors.

On the other hand, petitioner contends that under the practical construction and application which should be given to the statute the covenant, read in the light of the facts under which it is made, does provide that the dealer shall not deal in the gasoline of competitors of the lessor.

The Commission's complaints alleged, and the Commission found, "that only a small proportion of such lessees . . . require or use more than a single pump outfit in the conduct of their business." This being true, every lease entered into by respondents with dealers who require but one outfit in their business is one by which the lessee agrees not to handle the gasoline of competitors of the lessor. If the dealer has no business need or use for an additional outfit, he will necessarily not install it, and the result is that he can, under his contract, deal only in the gasoline of the lessor. Where these facts are known to both parties, there is certainly an "understanding," within the meaning of the statute, that the lessor will not deal in the gasoline of others during the existence of the lease.

In *Standard Fashion Co.* v. *Magrane-Houston Co.* (decided by this court on April 10, 1922), the contracts of the Fashion Company provided that the dealer should "not sell or permit to be sold on its premises" any other make of pattern; and it was contended by the pattern company that this condition did not violate the statute, since it did not provide that the dealer should not handle the patterns of competitors, but this court held the contrary, saying:

> It is idle to say that the covenant was limited to the premises of the purchaser, and that sales might be made by it elsewhere. The contract should have a reasonable construction. The purchaser kept a retail store

> in Boston. It was not contemplated that it would make sales elsewhere. The covenant, read in the light of the circumstances in which it was made, is one by which the purchaser agreed not to sell any other make of patterns while the contract was in force.

Again, in *U. S.* v. *United Shoe Machinery Co.* (decided by this court April 17, 1922), where the lease of the United Machinery Company did not contain an express provision that the lessee should not use machines of competitors, this court said:

> While the clauses enjoined do not contain specific agreements not to use the machinery of a competitor of the lessor, the practical effect of these drastic provisions is to prevent such use. We can entertain no doubt that such provisions as were enjoined are embraced in the broad terms of the Clayton Act, which cover all conditions, agreements, or understandings of this nature.

On this point Judge Morris, in his dissenting opinion in the instant cases decided by the Circuit Court of Appeals for the Third Circuit, says in part:

> With respect to the one-pump retailer the restrictive clause in the lease in question is as effective in preventing the lessee from using or dealing in the gasoline of a competitor of the lessor as if the lease expressly so provided. . . . It is likewise true that the lessee has the right to install another pump of his own or a pump of a competitor; but, as his business does not warrant or require more than one pump, he has not installed more than one, and, consequently, his right

> is not a practical one, but a mere abstract right. The result, in my opinion, is that in practice the restrictive clause of the leases in question has prevented and prevents a "single pump" lessee from using or dealing in gasoline of a competitor of the lessor just as effectively as if the lease had expressly so provided.

This reasoning is sound. In the development of the gasoline business it has come to pass that the underground tank of the retail merchant is his store. It is to the retail dealer in gasoline what shelves, counters, and showcases are to the retail dealer in tobacco, drugs, or general merchandise. If one such storage tank is sufficient to supply the retail dealer's trade, he will no more install a second than will the dealer in general merchandise build another store if his existing structure will amply serve his trade, though he have acres of vacant land. The leases in the instant case effectively exclude competition for the business of the only store which the dealer has or needs, and by so doing in fact provide that the lessee shall not deal in the goods of competitors.

3. MAY THE EFFECT OF THE LEASES BE SUBSTANTIALLY TO LESSEN COMPETITION.

The third and last element necessary to establish a violation of section 3 of the Clayton Act is that the effect of the leases "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

(a) *Meaning of the term "substantially lessen competition."*

This court has not thus far defined the terms "substantially lessen competition," nor have sufficient cases been decided under the statute to forecast its probable ultimate interpretation.

Light may be had on this point from a consideration of the state of the law at the time the legislation was enacted, the history of the times, and the mischief sought to be remedied.

For a number of years prior to the passage of the Clayton Act the opinion of legislators, administrative officers, and the public appears to have been crystallizing against the use of contracts requiring exclusive dealing, the payment of deferred rebates and allowance of discounts in consideration of such dealing, and the use of contracts or conditions attached to the sale or lease of patented articles requiring that supplies, etc., should be purchased from the lessor or seller.[3]

In many cases prior to the passage of the Clayton Act the contention had been made both by prosecuting officers of the Government and by counsel for private litigants that arrangements of this character, where evidenced by contracts, violated the Sherman Law because of their effect to restrain trade within the meaning of section 1 of the act, or because they constituted an attempt to monopolize within the

[3] For the prevalence of such arrangements and their effect upon competition see "Unfair Competition," by W. H. S. Stevens, University of Chicago Press, 1917, pp. 54-92.

meaning of the second section. The Federal courts, with one or two exceptions, had held, however, that such contracts and offers of rebates and discounts did not violate the act.[4] These decisions cover the period from 1892 to 1914, the year in which the Clayton Act was passed.

During the latter part of this period, the States of Massachusetts, Michigan, North Carolina, and Kansas enacted laws absolutely prohibiting contracts for exclusive dealing, and in some instances the payment of rebates and discounts in consideration of such dealing, without regard to their effect upon competition.[5] In other words, the legislatures of these States determined that such contracts or agreements were so dangerous to the public welfare that they prohibited their use under any circumstances.

These persistent efforts on the part of administrative officers and State legislatures doubtless impressed Congress with the desirability of prohibiting these contracts by special enactment, which was

[4] The following cases held such contracts and offers did not constitute violations of the Sherman law: *Wilder* v. *Corn Products Refining Co.*, 236 U. S. 165, 172–173; *in re Greene*, 52 Fed. 104, 117–118; *Olmstead* v. *Distilling Company*, 77 Fed. 265; *in re Corning*, 51 Fed. 205; *in re Terrell*, 51 Fed. 213; *U. S.* v. *Prince Line*, 220 Fed. 230, 233; *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 454, 461, 463. Cases holding contracts requiring exclusive dealing to be unlawful are: *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733, 738, 744 (1913), s. c. 217 Fed. 656, 659, 660 (1914); *United States* v. *Keystone Watch Case Co.*, 218 Fed. 502 (1915). It will be seen that one of the two decisions condemning such arrangement was handed down in the same year in which the Clayton Act was passed and another in the succeeding year.

[5] Mass. Revised laws, chap. 56, sec. 1; Mass. Laws 1907, chap. 469; Mich. P. A. 1905, No. 229, sec. 2; N. C. laws 1913, chap. 41, sec. 5b; Kansas Gen. Stats. 1909, sec. 1649. For a decision construing the Massachusetts statute, see *Commonwealth* v. *Strauss*, 191 Mass. 545.

done in section 3 of the Clayton Act. But inasmuch as these practices had been repeatedly held not to restrain trade or to amount to an attempt to monopolize, Congress, unless it desired to follow the example of the States and prohibit them absolutely, was compelled to adopt other language than that of the Sherman law,—to establish a new and different standard of legality. It did this by the use of the words "if the effect may be to substantially lessen competition or tend to create monopoly."

Concerning this, this court has said:

> The Clayton Act sought to reach the agreements embraced within its sphere in their incipiency, and in the section under consideration to determine their legality by specific tests of its own. (*Standard Fashion Co.* v. *Magrane-Houston Co.*, decided by this court on April 10, 1922.)

While thus holding that the Clayton Act established a new standard of legality by which the practices embraced in section 3 are to be judged, the court does not discuss at length the interpretation to be given to the section.

It is submitted that the proper interpretation to be given the words "substantially lessen competition" is to be reached by a consideration of the nature of the practice used and the manner in which it may lessen competition. To illustrate, a combination, by way of holding company, between practically all of the companies engaged in interstate commerce in a given line within a substantial ter-

ritory, would lessen competition by eliminating practically all competition from that field, and might amount to a restraint of trade prohibited by the Sherman law. An agreement between the principal companies engaged in interstate commerce in a given territory, fixing the prices at which they would sell their products, would lessen competition by eliminating price competition in a particular line. Such illustrations might be multiplied.

Similarly sales, contracts for sales, rebates or special discounts, in consideration of exclusive dealing, lessen competition by closing the avenues of trade to all competitors to the extent to which such contracts or arrangements are made and for the period covered by such contracts or arrangements. The quality or character of the restraint imposed by such contracts is always the same. It is merely that of exclusion. In the language of the District Court of the United States in *United States* v. *United Shoe Machinery Company*, 264 Fed. 138, 168—

> This places it in the power of the lessor to substantially lessen competition in these lines of trade, and therefore is obnoxious to the statute. As said in *Patterson* v. *United States* (222 Fed. 599, 620, 138 C. C. A. 123, 144), "But, though but one competitor can make a sale, all competitors can enjoy the free opportunity of approaching each and every prospective purchaser on equal terms, with the chance of making a sale, if he can persuade him to buy. For one competitor to exclude all, or substantially all, other competitors from such

> opportunity—i. e., drive them from the field of freely offering their goods so as to have that field to himself—is to monopolize, according to the legal and accurate sense of the word."

Obviously if a single manufacturer or wholesaler could make such contracts with all retailers in a particular line he could have a complete monopoly during the life of the contracts, except so far as new dealers might enter the business, and even these he might induce to make such contracts. Thus would competition be completely eliminated.

If this construction be correct, then the principal factors to be considered in a particular case are the size of the organization making the leases or contracts, the territory covered, the number of dealers in a particular line, the number under exclusive contract with the lessor or selling company, and the size and importance of such retail dealers. If competitive access to the market is closed to a substantial degree competition is substantially lessened.

(*b*) *No question of intent involved in Clayton Act.*

If the effect of the leases with the exclusive covenant is substantially to lessen competition, the intent with which such leases are made is of no consequence. A company might institute a policy of entering into such leases with the express intention of lessening competition or monopolizing, but if the number of contracts which it succeeded in securing was not sufficient to accomplish the desired purpose, there would be no violation of the Clayton Act. On

the other hand, if such contracts were entered into in such number and under such conditions that the effect was to substantially lessen competition, the purpose of the lessor, however innocent, would not avail to take the contracts out of the operation of the statute. Even under the Sherman law this court has consistently held that if the result of contracts or combinations is materially to restrain trade, the intent with which the thing is done is of no consequence (*U. S.* v. *Reading Co.*, 226 U. S. 324, 370; *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 75), and specific intent need not be alleged even in a criminal indictment. (*U. S.* v. *Patten*, 226 U. S. 525.)

(c) *The leases in the instant cases substantially lessen competition.*

In the instant cases the Standard Oil Company of New Jersey had approximately 42 per cent of the dealers in the large interstate territory in which it does business under leases by the terms of which the lessee dealers bind themselves not to sell through the equipment so leased gasoline purchased from others than the lessor. We have heretofore pointed out that since one equipment is all the dealer can use, such contracts are, in fact, exclusive (ante, pp. 16,26–29. Thus a large proportion of the market in that territory can not be successfully solicited by competitors of the Standard Oil Company of New Jersey during the continuation of the leases. Indeed, if the leases be legal, a court of equity will enjoin competitors of

the company from inducing dealers to purchase gasoline for sale through this equipment. When seeking to ascertain competitive conditions in this territory, similar leases existing between other wholesale marketers and retail dealers must be taken into consideration and the narrowing of the market to that extent increased. In some districts practically all dealers are under contract either with the Standard Oil Company of New Jersey or with other wholesale marketers, thus practically closing those districts to all outside competition in so far as the business of existing dealers is concerned.

The Standard Oil Company of New Jersey has invested in equipment leased with the restrictive covenant approximately $1,300,000, on which it receives in the form of direct returns only a nominal sum. If the leases be upheld, probably all of this equipment will remain with dealers until it is worn out, without other than nominal direct return to the company. This investment is therefore a fair measure of the value to the company of the restrictive covenant in the leases.

The Gulf and Maloney companies have a substantial number of leases outstanding in the same and other territories. Every such lease still further closes the avenues of competition.

While the leases of the Standard Oil Company of New York are not directly before the court in these cases, it was stipulated that the evidence, as respects the effect of the practice, should be applicable

against all companies, and it is proper therefore to refer to the fact that the Standard Oil Company of New York has approximately eight thousand dealers in New York and New England under similar leases. The effect of the exclusive covenant to lessen competition in these fields is apparent. On this point Judge Morris, in his dissenting opinion in the Circuit Court of Appeals for the Third Circuit, says:

> Whether its effect may be to substantially lessen competition or tend to create a monopoly is our second question for consideration. The leases are now in force. The fact that they may be terminated at some future time is not relevant to the issue now under consideration. What has already been said shows that "a large majority of the retailers" require for use in their business only a single pump outfit, and the practical effect of the restrictive covenant of the lease under which they operate is to prevent such large majority from using or dealing in the gasoline of competitors of their respective lessors. Thereby free competition among the wholesalers of gasoline has been and now is restricted, not with respect to an insignificant number of retailers, but with respect to a large majority thereof, and as effectually as if the leases were in perpetuity and as if they expressly prohibited the lessee from using or dealing in the gasoline of competitors of the respective lessors.

Where leases of this character have been entered into with established dealers theretofore using their own equipment, the effect has been to close those

theretofore existing outlets to all competition. In the language of the Circuit Court, in *U. S.* v. *Keystone Watch Case Company* (218 Fed. 502):

> * * * it should be observed that they were already established customers, not only of the defendant company but also of its competitors, and had already become trade outlets for every manufacturer of goods whose wares they had been accustomed to buy. Now, what the defendant did was either to close those already existing and already utilized outlets, or to narrow them materially so far as the goods, if its competitors were concerned; and we think the proposition need not be discussed that this was pro tanto a direct and unlawful restraint of trade.

Where new stations have been established by the lease of equipment on nominal consideration, competition between wholesalers and refiners has not been increased, since the dealer's business was monopolized by the lessor company at its initiatory stage. Doubtless in most such instances if equipment had not been loaned dealers would nevertheless have entered the business and competition for their trade would have existed. (Post, pp. 53–57.)

The lessening of competition is augmented by the necessity for most wholesale marketers to adopt the practice if competitors in their territory institute it. The record shows that a number of companies adopted the practice in order to hold any trade at all. Even the great Standard Oil Company of Indiana adopted the practice in self-defense. (Sinclair Rec., p. 135.)

The small people in the trade were feeling the necessity to a greater extent. (Sinclair Rec., pp. 137, 138, 167.) Competitors were making so many leases with restrictive covenant respecting the use of the equipment that companies not adopting them were being threatened with exclusion from the trade.

Moreover, the contention of respondents, urged below, that some small companies may, by leasing equipment on nominal consideration establish outlets for their product, begs the question of the effect of the leases on competition for the business of existing dealers. Certainly the law was intended to preserve competition in existing commerce, as well as in commerce which may come into being in the future.

(*d*) *The words "may be" authorize the court to estimate future results.*

Indeed the words "may be" in the statute have the contrary effect, and empower the Commission and the courts to look into the future, in the light of existing conditions and facts, and to stop the use of exclusive and tying contracts where there is a probability that they will have the prohibited effect. Considering the large number of contracts now outstanding, the fact that the companies are increasing this number as rapidly as they can induce dealers to enter into additional leases, and realizing that in the near future the dealer distribution must approximate consumptive demand, can there be any question that leases of this character will practically close the

market to competitive effort when equilibrium between consumptive demand and dealer distribution shall have been restored?

4. THE TENDENCY TOWARD MONOPOLY.

Section 3 of the Clayton Act provides also that leases or sales upon the covenant or condition of exclusive dealing should be unlawful if the effect may be to tend to create monopoly in any line of commerce. A tendency is an inference to be drawn from proven facts. The proof in the instant case is to the effect that great companies have now under the exclusive contract from 40 to 60 per cent of the dealers in substantial territories and that companies other than the lessor can not sell these dealers. Thus these companies already control a very large percentage of the interstate commerce in gasoline flowing into those territories. Some of these companies, conspicuously, of course, those who contested the Commission's order, desire to continue the practice, and if allowed to do so will seek to place additional dealers under these leases and by this means to increase their already high degree of control over interstate commerce in gasoline in the territories in which they operate.

It is not the fact that a particular company does a large percentage of the business in a given interstate territory which condemns it as monopolizing, but the fact that this percentage of the business is held by contracts which in terms exclude others from competing for it. In the language of the Circuit Court of Appeals for the Sixth Circuit:

> It is never to be lost sight of that actually doing business, no matter how large, is not monopolizing. It is excluding from the opportunity of doing business that is. (*Patterson* v. *U. S.*, 222 Fed. 599, 625.)

Can it not be said from these facts that there is now, in certain territories comprising substantial groups of States, a tendency toward monopoly of interstate commerce in gasoline in the hands of these companies? That tendency will be accelerated and increased with every set of equipment installed under the restrictive covenant. Ultimately some of the companies may have such contracts with all, or practically all, of the dealers in their territories, but when that stage of development has been reached there will be complete monopoly and the stage of substantially lessening competition and tendency toward monopoly will long since have been passed. Will this court arrest the movement while in its earlier stages but, we contend, within the prohibitions of the Clayton Act, or will it await the further development which will violate the Sherman Anti-trust Act?

5. EFFECT OF LEASES OF INDIVIDUAL COMPANY TO LESSEN COMPETITION NEED NOT BE NATION-WIDE.

That the operations of a given company cover a comparatively limited number of States and do not extend through the entire country will not take the contracts out of the operation of the statute, nor will

the fact that the competition suppressed is not relatively large. This has been the consistent holding even under the Sherman Antitrust Law. In *Montague & Co.* v. *Lowry* 193 U. S. 38, 45, a strictly local combination was under consideration and the restraint imposed by the agreement applied to but one per cent of the trade in San Francisco in unset tiles. And yet in that case this court said:

> The agreement, therefore, restrained trade, for it narrowed the market for the sale of tiles in California from the manufacturers and dealers therein in other States, so that they could only be sold to the members of the Association, and it enhanced prices to the nonmember as already stated. . . .
>
> Again, it is contended the sale of unset tile is so small in San Francisco as to be a negligible quantity; that it does not amount to 1% of the business of the dealers in tile in that city. The amount of trade in the commodity is not very material, but even though such dealing heretofore has been small it would probably largely increase when those who formerly purchased tiles from the mnaufacturers are shut out by reason of the association and their nonmembership therein from purchasing their tiles from those manufacturers and are compelled to purchase them from the San Francisco dealers.

Similarly, in *U. S.* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 88, 89, this court says:

> It is urged that this competitive traffic was infinitesimal when compared with the gross

> amount of business transacted by both roads, and so small as only to amount to that incidental restraint of trade which ought not to be held to be within the law; but we think the testimony amply shows that, while these roads did a great deal of business for which they did not compete and that the competitive business was a comparatively small part of the sum total of all traffic, state and interstate, carried over them, nevertheless such competing traffic was large in volume, amounting to many millions of dollars. Before the transfer of the stock this traffic was the subject of active competition between these systems, but by reason of the power arising from such transfer it has since been placed under a common control. It was by no means a negligible part but a large and valuable part of interstate commerce which was thus directly affected.

In like manner it has been held that combinations restricting competition in certain territory violate the Sherman law, though the territory involved be but a relatively small portion of the United States. (*Addystone Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211; *Eastern States Retail Lumber Dealers Association* v. *U. S.*, 234 U. S. 600.)

6. RIGHT OF THE DEALER TO TERMINATE THE LEASES ON SHORT NOTICE DOES NOT PREVENT THEM FROM LESSENING COMPETITION.

The fact that the dealer may terminate the leases on short notice does not materially lessen their effect

to eliminate competition. On this point Judge Morris in his dissenting opinion says:

> The leases are now in force. The fact that they may be terminated at some future time is not relevant to the issue now under consideration.

While the leases may be practically at the will of the parties, they are not at the will of others. (*Truax* v. *Raich*, 239 U. S. 33, 38.) Competitors may not induce their termination. Only differences between the wholesale marketing company and the retail dealer which would warrant the latter incurring the inconvenience, interruption to business, delay, and consequent loss attendant thereon will result in the termination of the agreement. Moreover, while there are so many hundreds of such leases in comparatively restricted territory an occasional termination would not materially lessen the restraint imposed thereby.

7. THE PRACTICE HAS NOT INCREASED COMPETITION.

Respondents urged below that the practice had increased competition by enabling some of the smaller companies to compete in certain territories, since they had by this method induced persons to go into the retail business and handle their products in territories where such wholesale marketing companies would not otherwise have been able to make any sales. But while there is evidence to this effect in the record, the conclusion that the result was to increase competition fails to take into account conditions in the gasoline industry at the time. We

refer to the fact that this was made possible by reason of the fact that during most, if not all, of the period covered by the evidence there was a phenomenal increase going on in the consumption of gasoline. During the five years last preceding the taking of testimony the consumption of gasoline increased from eightfold to tenfold. (Standard Rec., Vol. II, p. 549.) A rapid increase in the number of retail dealers during this same period was necessary to supply this enormously increasing demand. As a consequence, new companies or established companies entering new territory were able to induce some persons, by offer of free equipment, to enter the business of retailing gasoline. But this phenomenal increase in consumption of gasoline and automobile lubricants can not continue indefinitely, and when the retail dealers have reached a number necessary satisfactorily to supply the consuming demand the rapid increase in dealers will cease, conditions in the industry will become more or less static, and no longer will wholesale marketing companies be able to increase their sales by inducing persons to enter the retail business. Men do not enter upon a business when it is apparent that their territory is occupied by enough, or more than enough, dealers to take care of the trade. When this condition is reached, wholesale marketers will not be able to enter new territory at all or to secure new customers in old territory.

Furthermore, it does not follow that the mere entry of a new retail dealer increases competition, either between wholesale marketers or retailers, certainly not between the former. When the wholesale marketer induces a person to enter the retail business by loaning equipment with the exclusive covenant, he monopolizes the business of that dealer so far as sales to him are concerned. On this point Judge Morris in his dissent says:

> Again, the petitioners contend that by means of the leases in question the number of retailers has been substantially enlarged, and competition thereby increased rather than lessened. If it be a fact that by means of the leases the number of retailers has been increased, such increase can beyond question due to the nominal rental and not to the tying clause and the tying clause is none the less invalid, even though accompanied by other clauses that are valid. Furthermore, each increase obtained by the nominal rental was simultaneously monopolized by the tying clause and competition thereby lessened and not increased.

And the learned Judge might have added that additional competition among retailers did not necessarily follow from the establishment of a new dealer under the restrictive covenant. Retailers are enabled to compete in price largely by reason of price competition between those from whom they purchase. When the dealer is under covenant to pur-

chase exclusively from one wholesaler, even though the contract be terminable on short notice, he does not have the benefit of competition between wholesalers for his business. As long as the contract exists he must take his gasoline from the particular wholesaler and at whatever price the wholesaler makes. Being unable, therefore, to have competition in his purchases, competition in his sales is limited, not increased. Respondent's argument on this point fails to note, as elsewhere pointed out (Ante, pp. 37–38), the lessening of competition for the business of existing retail dealers.

8. FAILURE TO PROVE ENHANCEMENT OF PRICES DOES NOT RELIEVE FROM VIOLATION OF THE CLAYTON ACT.

The Circuit Court of Appeals for the Third Circuit holds that the public has not been injured by the restrictive covenant in the leases. Immediately thereafter the court states that it is not found that the practice has enhanced the price of gasoline. Whether prices have been reduced the court cannot say.

If enhancement of prices is the primary injury to the public which the court has in mind it is submitted that proof of such enhancement has never been necessary to establish a violation of the Sherman law, nor would proof of decreased prices take a combination or contract out of the operation of that statute. In *United States* v. *Trans-Missouri*

Freight Association, 166 U. S. 290, 323, this court said:

> In business or trading combinations they may even temporarily, or perhaps permanently reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may, nevertheless, be badly and unfortunately restrained by driving out of business small dealers and worthy men whose lives have been spent therein and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption or control over one commodity by an all powerful combination of capital.

Again, in *United States* v. *Swift & Company* (122 Fed. 529, 534), the court said:

> Indeed, combination that leads directly to lower prices to the consumer may, within the doctrine of these cases even as against the consumer, be restraint of trade; and combination that leads directly to higher prices may, as against the producer, be restraint of trade. *The statute thus interpreted has no concern with prices, but looks solely to competition, and to the giving of competition full play by making illegal any effort at restriction upon competition.* Whatever combination has the direct and necessary effect of restricting competition is, within the meaning of the Sherman Act, as now interpreted, restraint of trade.

The Clayton Act contains no mention of public interest or public injury. In the words of Judge Morris, in the dissenting opinion in the Third Circuit:

> In proceeding under that Act [the Clayton Act], the public interest is as conclusively presumed as in a criminal proceeding and needs to be neither alleged or proved.

He might have added with equal accuracy that the public was conclusively presumed to be injured if the effect of the contracts prohibited by the statute may be to substantially lessen competition.

Furthermore, the factors which operate to enhance or depress the market price of gasoline are so numerous and the measure of the effect a particular factor upon prices so difficult to arrive at, that it would be practically impossible to produce positive proof that the contracts in question directly affect prices. We contend that the law assumes that if competition is materially restricted it will necessarily, in some measure, increase prices. Moreover, the Antitrust Acts, including the Clayton Act, while intended, broadly speaking, to preserve price competition, were also intended, in the language of this court in *Ramsay* v. *Associated Bill Posters* (decided by this court January 2, 1923), "to preserve equality of opportunity in the field of commerce."

In the instant case the evidence shows beyond dispute that the lending practice both restrains competition and tends toward monopoly for the reason that it destroys the freedom of solicitation

for business, which the oil distributor would otherwise have or, to employ the phrase used in *Montague* v. *Lowry*, supra, the practice "has narrowed the market," and removes the opportunity for competition, because it ties thousands of individual retailers to the oil distributing corporations making the loans.

The violation of section 5 of the Federal Trade Commission Act.

The Federal Trade Commission Act provides in section 5 that—

> Unfair methods of competition in commerce are hereby declared unlawful.

This is a comprehensive definition of every method of bringing about unfair competition. All methods, any method, every method, if it shall appear to be directed at the overthrow of free and fair competition, is condemned. The method, whatever it may be, is unlawful if its effect be the prescribed unfair competition.

Free and fair competition is the affirmative and positive principle upon which our industrial and, in turn, our social system is based. The competitive system is justified upon the postulate contained within it that as a result of the operation of free and fair competition there results to the unit the highest degree of reasonable return and to the public the best service at the lowest cost. And so the antitrust laws and kindred statutes place monopoly at the opposite pole from fair competition. But seeing the

necessity for prevention of monopoly, as well as its punishment, attempt at monopoly was also included in the Sherman Act. Looking still further into the field of prevention it appeared that the way from free and fair competition toward monopoly led through restraint of trade, which was also therefore prohibited by the Sherman law.

But experience proved that either because of the limited condemnation of methods by the Sherman Act or because that act did not go far enough into the field to protect free and fair competition in the initial stages of the departure from those principles, it was not effective, and Congress took two steps forward by the Trade Commission Act. It threw off all limitations as to methods and amplified its definition of the unlawful departure from free and fair competition. Monopoly and restraint of trade are still under the ban, but the scope of preventative measures has now been advanced in the anticipatory field to check the movement from free and fair competition at the stage of unfair competition.

This court recognized this in the decision of *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, where it said:

> The words unfair methods of competition are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression or as against public policy because of that dangerous tendency unduly to hinder competition or create monopoly.

This declaration was reaffirmed in *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 42 Sup. Ct. Rep. 150, where the court said:

> If the Beech-Nut system of merchandising is against public policy because of "its dangerous tendency unduly to hinder competition or to create monopoly" it was within the power of the Commission to make an order forbidding its continuance.

The manner in which the practice condemned by the Commission in its orders in these cases substantially lessens competition or tends toward monopoly has already been discussed (ante pp. 35–39, 40–41). By the same reasoning the practice has not only a dangerous tendency unduly to hinder competition but in a large measure eliminates competition. Where he who seeks to sell gasoline in a large interstate territory finds as he goes about that from six to eight in every ten retailers approached are under contracts which in effect bind them to purchase from others, has not a practically complete barrier to competition been erected and trade effectively monopolized?

IV.

ALLEGED ADVANTAGES OF THE PRACTICE URGED IN JUSTIFICATION.

The respondents urged in the courts below a number of alleged advantages, both to themselves and to the public, resulting from the use of the practice which it was claimed fully justified its continued use. These alleged advantages will be discussed separately. Before entering upon their consideration in detail,

however, we desire to point out, first, that practically every advantage urged in favor of the practice in fact inheres in the pump and tank as an institution *not in the use of the restrictive covenant*, and, second, if the effect of the restrictive covenant is to substantially lessen competition or tend to create monopoly, no supposed advantage can justify its use as matter of law. Congress definitely determined the public policy when the law was enacted, and if it erred in declaring that no advantage in the use of the prohibited practice would compensate for the substantial lessening of competition resulting therefrom it must itself correct the error.

1. The loaning practice with restrictive covenant not essential to adequate equipment installation.

Respondents have urged below that the practice of loaning equipment with restrictive covenant is necessary if the public is to be adequately served with gasoline, and the court below held that if the practice were discontinued the inevitable result would be to reduce the number of curb-pump stations. We contend that this is refuted by the record. Richard D. Leonard, general manager of domestic sales of the Great Atlantic Refining Company, one of the subsidiaries of the old Standard Oil combination, testified in the most emphatic terms that his company sold four out of five sets of the equipment which it put out and could sell the fifth if its competitors were not giving them away. (Standard Rec., Vol. II, pp. 560–590.) This company prefers to sell equipment rather than lend it. (Standard Rec., Vol. II, p. 584–588.)

The following is quoted from Mr. Leonard's testimony:

> Q. Do you find in your experience that you find a good location for the establishment and installation of a curb-pump equipment where the owner or lessee of the location is unwilling to make the investment in an equipment or has not the capital to do so?
>
> A. I would say the general average is that a man has to have some period of time over which to pay for his material, pay for his installation. The problem of selling it to him is relatively simple. (Stand. Rec., Vol. II, p. 560.)

The manager of tank stations of the Crew-Levick Company, having charge over parts of five States, testified:

> Q. Have you not found out in your experience with the Crew-Levick Co. that it is not possible in many cases to persuade a person who has a proper location to buy a pump or pump equipment?
>
> A. I do not say so.
>
> Q. Well, what has been your experience?
>
> A. The man that has got a good location you can undoubtedly go to him and sell him a pump. It is not necessary to give him one . . .
>
> Q. . . . My question to you is this: Whether in your experience you have found persons owning or occupying desirable locations along the road through Pennsylvania who, notwithstanding they have desirable locations, either have not the money or are unwilling to invest

it in the pump equipment with a view to furnishing oil and gasoline products to the public?

A. I have not found any such cases as that. I do not believe that there is a case where a man owns a piece of property and where he has good traffic advantages where you can not go to him and show him that with a certain investment he will get a return of ten, or fifteen, or twenty, or twenty-five per cent a month, that you can not sell him. He will go around some place and dig up the money. (Standard Rec., Vol. II, pp. 194–195.)

Another witness having thirty-two years' experience in the gasoline trade testified:

Q. . . . What do you think is the rule that ought to determine the number of gasoline distributing centers to be used by the public? I do not know whether I make that question clear.

A. You make it clear. I understand, but there is a large question involved there. I would answer that in this way. The free competition of unsubsidized agencies will provide the public with all proper and convenient facilities. (Standard Rec., Vol. II, p. 292.)

Still another witness says:

Q. Do you think that if the Commission were to order and enforce the cessation of this practice of leasing and loaning pumps under the tying contract for a nominal consideration that the result would be a disadvantage to the public from the point of view of numerical number of distribution centers of gasoline products?

A. I do not, because I think the ordinary garage, if the practice was discontinued, from their own standpoint, would put in that equipment just the same as they put in a vulcanizer, or anything else used in a garage.

Q. How about a smaller retailer, like the grocery man in the smaller communities?

A. I think he would put in the equipment necessary to distribute it, depending upon the amount he was distributing. (Standard Rec., Vol. III, p. 293.)

A number of substantial companies have adopted the practice solely because their trade was being taken away from them by competitors who were making loans of equipment to their customers. (Standard Rec., Vol. II, p. 528; Vol. III, pp. 13–14, 265–266.)

Further evidence that there will be no dearth of equipment if the practice is discontinued is found in the fact that the practice appears not to have found its way into that part of the country lying west of the Mississippi River. (Stand. Rec., Vol. III, p. 241.) The court may take judicial notice of official statistics which show that the number of automobiles per thousand inhabitants is greater in the western part of the United States than in the eastern. Respondents would probably not contend that the farmers of Minnesota and Iowa, the fruit growers of the Pacific Coast, or the automobile makers of Michigan (Standard Rec., Vol. II, pp. 407–408) have needed any of the advantages or conveniences in the use of their automobiles which have been enjoyed by the residents of the East.

In the light of the testimony above quoted (supra, pp. 54–56), to the effect that a sale of equipment can be effected if there is prospect of sufficient gasoline to justify it, there can be no doubt that the sale force of the companies engaged in the manufacture and sale of equipment, as well as the salesmen of the oil companies which sell equipment, as distinguished from loaning it, will see to it that sufficient equipment is installed to meet public convenience. (Standard Rec., Vol. II, pp. 152–153–291.)

It is submitted, therefore, that the holding of the Circuit Court for the Third Circuit to the effect that the inevitable result of sustaining the Commission's order would be to reduce the number of curb stations is not supported by the record.

If without the loaning practice with restrictive covenant sufficient equipment will be installed to meet the convenience of the public, then any installations beyond this will not only not result in benefit to the public but will tend to impose undue burdens upon consumers. The cost of the equipment put out by the wholesale marketing companies, as well as the cost of the operating of the retail stations, must ultimately be reflected in the price of gasoline to the consumer, and where unnecessary installations are made in large numbers this additional cost may be appreciable. There is considerable evidence in the record showing that in some localities more installations are being made than are required either for public convenience or for economical distribution to the wholesale marketers. (Stand. Rec., Vol. II, p. 78, 134, 261, 262, 300, 301, 307, 312, 365–367, 216–217, 268.)

2. Loaning practice not necessary to obtain ample storage capacity.

What has been stated under the heading immediately preceding clearly demonstrates the unsoundness of respondents' contention that they must follow the practice of loaning equipment with the restrictive covenant in order to secure the installation of sufficient storage capacity by dealers to render respondents' distribution economical. In this connection particular attention is invited to the testimony of Mr. Leonard, of the Atlantic Refining Company, who personally made a survey of the entire territory served by his company (Pennsylvania and Delaware), studied every town of 2,000 inhabitants or more, and made a computation of storage requirements for each locality. This survey was made with a view of determining what increase in storage capacity and distribution machinery was necessary to meet the expected immense increase of consumption by auto trucks. The result was a definite campaign by the company to increase storage and particularly to install pump and tank equipment upon good locations. (Standard Rec., Vol. II, p. 553.) His experience is, therefore, particularly convincing to the end that of the many equipments that they succeeded in installing they were able to sell four out of five. (Standard Rec., Vol. II, p. 584.) If it had not been known by everyone, as he pointed out, that the company would lend freely if unable to sell, it is evident that the sales would have been practically universal (Standard Rec.,

Vol. II, p. 560) and entirely without resort to the practice condemned by the Commission. Despite, or perhaps because of, his full knowledge on the subject Mr. Leonard's company prefers to sell equipment to lending it.

3. Loaning practice with restrictive covenant not necessary to protect brands.

Respondents claim that leasing equipment at a nominal consideration with restrictive covenant is the only means by which they can adequately protect their trade names and brands; that unless they be permitted to follow the practice retail dealers will sell the product of one wholesale marketer through equipment bearing another's mark and thus mislead the buyer. This practice contemplates, of course, deliberate substitution and misrepresentation by the dealer. The evidence clearly refutes this contention.

For the purpose of clearly understanding the practice obtaining where the retail dealer owns his equipment, it should be stated here that in such cases the dealer uses an illuminated globe connected with the pump which sometimes carries the name of the gasoline dispensed through the equipment, but in many instances merely carries the word "gasoline" thereon. In the latter case a painted sign in close proximity to the equipment usually indicates the brand of the gasoline dispensed. If the dealer changes the brand sold through the particular equipment, he promptly removes the illuminated globe or painted sign and substitutes one which shows the gasoline sold. The

wholesale marketer who loses a retailer as a customer will see to it that his sign is removed when the dealer no longer sells his gasoline. (Standard Rec., Vol. II, p. 493; Vol. III, p. 140, 22–23; Vol. II, p. 516–517, 500, 493; Vol. III, p. 32–34.)

The claim that retail dealers do not change their signs but display the sign of one wholesale marketer while dispensing the gasoline of another is refuted by direct evidence in the record. (Standard Rec., Vol. II, pp. 487–488.) There is in addition a substantial amount of evidence showing that marketers of widely advertised brands owning valuable trademarks and trade names who have engaged to some extent in the leasing practice prefer to sell rather than lease equipment. This preference would certainly not exist if the leasing practice were necessary to protect brands. (Standard Rec., Vol. II, pp. 561–682, 558–559, 560, 584, 588, 590, and 472.) Nor can it be assumed that western marketers have no protection for their brands.

Witnesses further testified that there is no relation between the leasing and loaning practices and the proper advertisement of brands in connection with sales at retail. (Standard Rec., Vol. II, pp. 33–34; Id. II, p. 469; Vol. III, p. 140.)

Timely removal of the sign if the retailer changes brands of gasoline is all that is required to protect the trade name. (Standard Rec., Vol. II, pp. 516–517, 500, 493.)

Finally, there is apparently not any company which sells its entire output to dealers through equip-

ment installed by the seller with the covenant to distribute the vendor's gasoline only. All companies are willing and anxious to sell to dealers who own their own equipment and display the refiner's or wholesale marketer's sign, and the danger that some other refiner's product will be substituted for theirs does not deter them either from selling to such dealers or from furnishing their trade-mark signs to be used in connection with the retailer's business.

In connection with this point it may be added that any manufacturer of a liquid or staple commodity who sells to the trade in bulk necessarily incurs the risk that dishonest dealers may sell the products of other manufacturers under the representation that they are his. Be it said to the credit of the trade, however, that in the instant case the record shows that substitution of gasoline of one refiner or wholesaler for that of another is very rare. The wholesale marketer has ample redress in the courts for such isolated cases as may occur, and he may not substitute for this remedy contracts for exclusive dealing which may substantially lessen competition or tend toward monopoly.

4. Security in handling gasoline does not require the loaning of equipment.

That the further advantage of security in handling, supposed result from the loaning practice, vanishes upon consideration is similarly evident. The safety obtained is solely inherent in the pump and tank

equipment as an improvement upon the five-gallon can, the barrel, and the drum. It does not consist in the lease or the loan with restrictive covenant.

It is clear throughout the record that in no event will the trade or the public consent to return to the old type of equipment. (Standard Rec., Vol. II, pp. 277, 310.)

5. The loaning of equipment is not necessary to economy.

There is much to show that the curb pump and tank at convenient points conduces to low cost of delivery. The experience of the Atlantic company is absolutely conclusive upon this point. It is shown that practically the only way in which economy can yet still be effected is by lowering the costs of delivery and having equipment installed at points where deliveries can be made with regularity and infrequency. (Standard Rec., Vol. II, p. 551.) But installation of the equipment with sufficient storage capacity can be made businesslike to a prospective purchaser thereof, and the success of the Atlantic company and the manufacturers of the equipment in selling equipment (ante, pp. 53-56) shows that the loaning practice is not essential.

6. Nor is loaning of equipment necessary to public convenience.

By the same token it follows that the public has not the slightest interest to maintain the gratuitous loaning of equipment or the restriction of competition by a clause in the lease. We have shown that the

interest is to the contrary. The public is interested in seeing that it can buy good gasoline at convenient points from convenient equipment—that is, at curb pumps or service stations—but not in having the equipment tied to particular corporations.

7. The securing of "gallonage."

Practically all the corporations doing this business whose witnesses were examined at any length testified that one of the advantages from the practice was the obtaining of gallonage. We shall forbear quotation, since the fact will certainly not be controverted.

If it be necessary or even advantageous to restrict dealers to the use of equipment for the product of a company in order to obtain gallonage, what deduction should be made from such fact?

The company restricting its dealers from purchasing elsewhere is proposing, by the restrictive clause, to hold business and keep up gallonage artificially. Otherwise they would be agreeable to the equipment being owned by the individual dealer, as contrasted with the plan centering in the restrictive covenant. We have shown that the management of the Atlantic Refining Company prefers to make outright sales of equipment to loaning, and we have further shown that this company has not found it necessary to bind the dealer in order to secure the advantages which we have discussed above. (Ante, pp. 53–54.)

The same, however, can not be said of the desires of the companies who are asking for review of the

order of the respondent Commission. That they not need the restrictive covenant as a protection their brands, or to secure adequate facilities, etc., evident from the facts and evidence above outline But they are desirous of securing the restrictive cov nant and keeping the control of the equipme placed with dealers, in order to maintain their ga lonage. This can only mean that if the deal owned the equipment he would be free to deal els where and might exercise his liberty, and their ga lonage suffer accordingly. It is from this admitte and obvious point of vantage that the restricti covenant assumes a sinister aspect as regards i effect upon competition.

8. The control of the trade of the individual deale to whom equipment is loaned.

This last-named advantage, existing solely from the standpoint of the loaning corporation, is tha wherein the disadvantage to the public is clearly ob vious. Although the large companies, opposing th order of the Commission, deny that their object is t monopolize the trade of each individual dealer, it can not be glossed over that the benefit to their gallonag resulting from the practice is due solely to the monop lization of individuals. There is no criticism agains any company increasing or protecting its gallonage or securing "its share," or a lion's share, of the trade provided always that no restrictive methods of com petition are employed. But restrictive covenants in many thousands of loan agreements clearly con

stitute the adoption of a fixed policy counter to the law as outlined above. In this connection we quote from the testimony of Mr. Frech, manager of the White Star Oil Company:

> Q. Now, I am directing your attention to those cases alone where the garage man would buy the pump if you or somebody else did not loan him one. In those cases it would be to your economic interest or not, do you think, to loan a pump to such an individual if no one else were likely to loan one; or, put it, if no one else did or would loan him a pump?
>
> A. Well, I do not know about that. I think if no other oil company loaned pumps and we did loan it we would get more business if we did loan them.
>
> Q. Then in that case that advantage would come from the monopoly you would derive?
>
> A. Yes.
>
> Q. So that one of the reasons for leasing and loaning these pumps is that you thereby monopolize the business of your customer?
>
> A. Sure; that is one of the reasons.
>
> (Standard Rec., Vol. III, p. 65.)

V.

EFFECT OF SUSTAINING COMMISSION'S ORDER UPON INVESTMENT OF RESPONDENT COMPANIES IN EQUIPMENT.

Respondent companies have raised the question of the effect of sustaining the Commission's order upon investment in loaned equipment. We submit that the result will not, and can not, conceivably be to the financial detriment of the respondents, save as finan-

cial return inheres in the exclusive covenant. If the orders are sustained, the retail dealers will have no irritation as against these petitioners or such marketing company as may have loaned them equipment. They will be obliged to terminate the loaning contract and will consequently desire to buy equipment for the purpose of continuing their business. Whose equipment will they be most likely to buy—that of some other corporation? Or will they follow the line of least resistance and purchase the equipment already installed on their premises?

It is obvious that they will much prefer to purchase the equipment already on the ground and will tend, if satisfied, to continue to do business with the corporation which has the equipment on their premises for sale, but thereafter only upon a free competitive basis.

Let us suppose that a considerable proportion of these dealers attempt to buy the equipment for less than its cost minus depreciation. If this prove to be true, and the company owning the equipment be obliged to sell at less than the present actual worth, it nevertheless appears that every dollar which the company receives for the equipment is a dollar more than it would have received if the Commission's order had not been sustained, disregarding for the moment the nominal consideration for the loan, which is seldom collected and is negligible if it be paid.

The loaning companies will actually be benefited in that they will receive compensation for what otherwise would be a total loss at the end of the five to ten

year period which constitutes the life of this class of equipment. (Standard Rec., Vol. II, p. 64.) They lose control only.

VI.

RESPONDENTS ARE ENGAGED IN INTERSTATE COMMERCE.

It was alleged in the Commission's complaint that the various companies, here respondents, purchased both equipment and gasoline and transported the same in interstate commerce and that, in the conduct of their respective businesses, the equipment and products are constantly moving from one State to another in a constant current of trade in such products. (Standard Rec., Vol. 1, pp. 4, 5; Maloney Rec., Vol. 1, pp. 3, 5; Gulf Rec., Vol. 1, pp. 3, 4, 5.)

The answer of the Standard Oil Company of New Jersey admits that it is engaged in interstate commerce, both in petroleum products and in equipment. (Standard Rec., Vol. 1, par. 2, p. 8.) Both the Gulf Refining Company and the Maloney Oil & Manufacturing Company admit in their answers that they are engaged in the manufacture and sale of petroleum and petroleum products in interstate commerce. (Gulf Rec., Vol. 1, par. 7, p. 9; Maloney Rec., Vol. 1, par. 2, pp. 7, 8.) Both the Gulf and the Maloney Companies, however, contended in the court below that the leases of equipment are made in connection with the sale to retail dealers of gasoline which has come to rest in the State before sale by respondents

from tank wagons, and that the Federal Governmen is therefore without any jurisdiction over these trans actions. Petitioner contends, on the other hand, tha the sales by respondents of gasoline and equipmen shipped from States other than those in which sale are made are a part of interstate commerce.

In this relation the petitioner makes the following points:

1. That the leasing contracts contemplate and necessitate the importation by respondents of gaso line into a number of the States to supply the trade of dealers and are therefore a part of their interstate commerce;

2. That even if the leasing contract be deemed only initiatory of sales of gasoline rather than providing for such sales, nevertheless the contracts are a part of interstate commerce. They are more intimately connected with sales of gasoline than mere negotiations leading up to such sales, and such negotiations are consistently held to be a part of interstate commerce;

3. That the respondents' sales from tank wagons of gasoline habitually transported by them from other States for the purpose of such sales are a part of interstate commerce and that the original package doctrine is not applicable to take such sales out of interstate commerce.

1, 2. The leasing contracts are a part of respondents' interstate commerce.

Discussing the first two points above outlined, it is submitted that where a corporation has its principal office and place of business in one State and enters into contracts through its sales agents in other States to sell to persons in such States, and such contracts require for their fulfillment the transfer of commodities so sold from other States, the shipment and sales so made are interstate commerce and the contracts are a part of such commerce. (*Crenshaw* v. *Arkansas*, 227 U. S. 389; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Stewart* v. *Michigan*, 232 U. S. 665; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Dozier* v. *Alabama*, 218 U. S. 124; *Davis* v. *Virginia*, 236 U. S. 697.)

The contracts by which the respondents lease or lend equipment and by the terms of which the dealers agree to purchase all oil sold through such equipment from respondents are a part of respondents interstate commerce in gasoline and other refined products and as such are subject to Federal regulation. The competition lessened is competition between respondents and other marketing companies doing a like business. The effect of the exclusive terms of the contract is to restrain, prevent, or curtail importation of gasoline by competitors in interstate commerce into the several States covered by respondent companies.

The delivery by respondents from day to day of quantities of gasoline required by the dealers under contract, at the current market price, are in performance of the contracts previously entered into, which require the respondents to supply all the gasoline sold through the equipment loaned or leased and obligate the dealers to purchase from the respondents all gasoline so sold.

3. Respondents' sales from day to day are a part of their interstate commerce.

But if the contracts under which equipment is leased and which bind the dealers to purchase petroleum products from respondents are held to fall short of contracts for the sale of gasoline, it is contended that respondents' sales from their storage tanks form a part of interstate commerce in gasoline.

Where a corporation, having its principal place of business in one State but having a great sales organization extending over a number of States, purchases a commodity in various States in large quantities, ships it into various other States and there sells it and where this is a typical, constantly recurring course, the sales thus made are a part of interstate commerce in the commodity and subject to Federal regulation. It was so held by this court in *Swift & Co.* v. *U. S.*, 196 U. S. 375, where the court said:

> When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another

> and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another State from that of the seller and of the cattle. And we need not trouble ourselves at this time as to whether the statute could be escaped by any arrangement as to the place where the sale in point of law is consummated.

This decision is in accord with other decisions of this court. (*Hopkins* v. *U. S.*, 171 U. S. 578, 590; *Standard Sanitary Mfg. Co.* v. *U. S.*, 226 U. S. 20, 49.)

This court has very recently fully considered whether purchasers and sales of commodities transported in interstate commerce are a part of such commerce and has reaffirmed and possibly extended the doctrine announced in the Swift case. (*Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290, 292; *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265; *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277; *Lemke* v. *Farmers Grain Co.* 258 U. S. 50.) In the Dahnke-Walker case the court says:

> Where goods in one State are transported into another for the purpose of sale the commerce does not end with the transportation, but embraces the sale of the goods after they reach their destination and while they are in

> the original package. (*Brown* v. *Maryland*, 12 Wheat. 419; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 519.) * * * The State court, stressing the fact that the contract was made in Kentucky and was to be performed there, puts aside the further fact that the delivery was to be on board the cars and that the plaintiff, in continuance of its prior practice, was purchasing grain for shipment to its mill in Tennessee. We think the facts so neglected had a material bearing and should have been considered. They show what otherwise seems an intrastate transaction was a part of interstate commerce.

If the purchase of a bulk commodity such as wheat in one State, where it is proven that the habitual course of business is to transport the commodity so purchased to another State, is a part of interstate commerce, it necessarily follows that the sale of such commodity by the purchaser, after shipment, in States other than those of their purchase, where this is a typical, constant recurring course of business and where the entire transaction of purchase, shipment, and subsequent sale is carried on by the same organization, is likewise a part of interstate commerce. No possible difference in principle can be found between the purchase in one State for shipment in interstate commerce and the shipment for sale at destination in another State.

4. Original-package doctrine is not applicable.

The fact that gasoline and other petroleum products purchased by respondents in various parts of the United States and shipped into the States other than those of purchase for sale to retailers are stored in the States to which shipped and delivered as ordered by customers does not preclude the Federal Government from regulating such sales and contracts made in connection therewith. The original-package doctrine was announced for the first time in *Brown* v. *Maryland* (12 Wheat. 419), where it was held that the importer of goods was necessarily entitled to the right to sell them and that the States could not impose a tax as a condition of the exercise of the right. The decision, therefore, upheld the right of the importer to sell that which he had purchased in interstate commerce free from state restrictions thereon.

The business of respondents is essentially different from that of local dealers in a great variety of package goods, who purchase some parts thereof without the State and some from within it, and, breaking the packages, mingle the goods upon their shelves. These respondents handle a single line of products, a liquid commodity which they ship into the various States in bulk, place in their own storage, and sell from such storage by tank wagons. Until sold by respondents it never becomes mingled with the goods within the State, as does the stock of broken package goods of local dealers. Under the facts here pre-

sented the right of respondents to sell from their own storage, we contend, is insured by the commerce clause of the Constitution, and this right is not lost by the fact that respondents draw the commodity from storage and transport it to customers in their tank wagons. The sale thus made is nevertheless a sale of a commodity imported into the State by the importer of the commodity, and the commodity does not lose its identity as an article of interstate commerce until within the hands of the first purchaser within the State.

5. Cases upholding the power of the State to tax are not in point.

Counsel for respondents in the court below rely upon cases which relate to the point in course of interstate commerce at which the right of the several States to tax commodities attaches. Decisions in cases of this character have been frequently distinguished by this court from those turning upon the question of the jurisdiction of Congress to regulate interstate commerce and of agencies created by Congress for the enforcement of laws intended to preserve competition and prevent monopoly. (*Lemke* v. *Farmers Grain Co.*, 258 U. S. 50; *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 245; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 521; *Swift & Co.* v. *U. S.*, 196 U. S. 375, 378.)

6. The tendency toward monopoly disclosed by the record is a monopoly of interstate commerce.

The consequence of the use, if continued, of the contracts challenged by the Commission in these proceedings will be to acquire for the respondents an increasingly large amount of shipments of gasoline and other petroleum products from various States of the Union into the State in which these respondents sell and of the sales in those States of those commodities. The monopoly of this business is so obviously a monopoly of interstate commerce that citation of authorities would hardly be more convincing than the bare statement. He who acquires complete control of the shipment of an important article of commerce from various States into a group of States and of its sale in the States to which he ships it monopolizes interstate commerce in such commodity within the meaning of the Sherman law, and the tendency toward such control is a tendency toward monopoly in interstate commerce and a lessening of competition in such commerce. Authorities cited herein (ante, pp. 42–43) show that the monopolization of, or restraint of trade in, a much less substantial amount of commerce in a given article and in a much smaller area geographically than is here shown is sufficient to constitute a violation of the Sherman law. (See also *Ramsay* v. *Associated Bill Posters*, decided by this court January 2, 1923.)

VII.

THE RETAIL DEALERS WERE NOT NECESSARY PARTIES TO THE COMMISSION'S PROCEEDINGS.

The retail dealers in gasoline, having equipment under lease, were not necessary parties to the Commission's proceedings. This court held in *U. S. v. United Shoe Machinery Co.* (decided April 17, 1922) that shoe manufacturers leasing machinery from the shoe machinery company were not necessary parties to a suit in equity instituted by the Attorney General under section 3 of the Clayton Act to test the validity of the leasing contracts, the court saying in part:

> The relation of indispensable parties to the suit must be such that no decree can be entered in the case which will do justice to the parties before the court without injuriously affecting the rights of absent parties. *1 Street's Equity Practice*, 519, quoted with approval in *Waterman v. Canal-Louisiana Bank Co.*, 215 U. S. 33, in which case the former adjudications in this court are cited and considered. The covenants enjoined were inserted for the benefit of the lessor, and were of such restrictive character that no right of the lessee could be injuriously affected by the injunction which was prayed in the case. We are of opinion that their presence was not necessary to a decision.

This reasoning is applicable in the instant case.

There are additional and conclusive reasons why the lessees are not necessary parties to a proceeding

by the Commission to prevent violations of section 3 of the Clayton Act.

The Commission is a statutory body having only those powers specially conferred upon it by statute or such powers as may reasonably be implied from those expressly granted.

By section 11 of the Clayton Act, the Commission is authorized to issue its complaint against any person whom it has reason to believe is *violating* or has violated sections 2, 3, 7, or 8 of that act. Furthermore, the Commission's order to cease and desist is to be entered, after hearing, against the person *violating* the act. It will be observed that the condition prohibited is that the lessee or purchaser shall not use or deal in the goods of a competitor or competitors of the lessor or seller. Clearly such a condition would not be sought by the lessee or purchaser. A study of the section reveals therefore *that its prohibitions are directed only against the person making the sale or contract for sale or leasing the machinery, etc.*

It was the large manufacturer, the large producer, the extensive dealer who was introducing these clauses into his contracts. It was against such manufacturers or dealers that the statute was directed. Furthermore, the effect which renders the making of the prohibited contracts unlawful is that it substantially lessens competition. A single retail dealer or wholesaler could not substantially lessen competition by entering into such a contract, and therefore could not violate the statute.

It follows from the above that since the Commission is directed to issue its complaint and order only against the person violating the statute it has no authority to issue a complaint against the vendees or lessees, parties to such contracts, who have clearly not violated the law.

The Court of Appeals for the Seventh Circuit clearly erred in holding that the lessees were indispensable parties.

CONCLUSION.

The judgments of the courts below should be reversed and the Commission's orders sustained.

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FILED
MAR 13 1920
WM. R. STANSBURY

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1922.

FEDERAL TRADE COMMISSION,

Petitioner,

v.

STANDARD OIL COMPANY (NEW JERSEY),

Respondent.

No. 637.

RESPONDENT'S BRIEF.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1922.

FEDERAL TRADE COMMISSION,
Petitioner,

AGAINST

STANDARD OIL COMPANY (NEW JERSEY),
Respondent.

No. 637.

On Certiorari to United States Court of Appeals, Third Circuit.

BRIEF IN BEHALF OF STANDARD OIL COMPANY.

Statement of the Case.

In the natural growth of the oil business, it has become the common practice for refineries and wholesale vendors of gasoline to lease and loan tanks with pump equipments commonly called "Curb pump outfits", consisting of a storage tank, a self measuring pump and the necessary equipment to permit of the use thereof, for a nominal consideration to purchasers of gasoline to re-sell at retail to consumers. Ordinarily there is an agreement that no product other than that sold by the Company furnishing the "Outfit" shall be handled in or sold from the outfit so leased or loaned. There is no restriction upon the use of other outfits similarly furnished by other oil companies, or no restriction on the use or sale by the

retailer of petroleum of its products or competing oil refineries or wholesalers.

The Federal Trade Commission filed its complaint against Respondent alleging in the first count:

That the trade practices as above stated are unfair competition in violation of Sec. 5 of the Act of Congress, entitled "An act to create a Federal Trade Commission to define its powers and duties and for further purposes", approved September 26th, 1914 (38 Stat., 717), commonly called the Federal Trade Commission Act; and in the second count:

That the agreement or contracts for the lease or loan of said outfits were "tying contracts" so called and violative of Sec. 3 of the Act of Congress, entitled "An act to supplement existing laws against unlawful restraints and monopolies and for other purposes", approved October 15th, 1914 (38 Stat., 730), and generally known as the Clayton Anti-Trust Act.

After answer filed by respondent and hearings had, the petitioner made its report, findings and conclusions and issued its order directing this Respondent forever to cease and desist from;

1. Directly or indirectly leasing pumps or tanks, or both, and equipment for storing or handling petroleum products in furtherance of its petroleum business at a rental which will not yield to it a reasonable profit on the cost of same after making due allowance for depreciation and other items usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom, and from doing any matter or thing which would have the same unlawful effect as that resulting from the practice herein prohibited, and by reason of which this order is made;

2. Entering into contracts or agreements with dealers in its petroleum products or from continuing to operate

under any contract or agreement already entered into, whereby such dealers agree or have an understanding that as a consideration for the leasing to them of such pumps and tanks and other equipment, the same shall be used only for storing or handling the products of petitioner, and from doing anything having the same unlawful effect as that resulting from the practice herein prohibited, and by reason of which this order is made.

Thereupon respondent filed its original petition in United States Court of Appeals, Third Circuit, to review and vacate the aforesaid order, and the said court after hearing argument and reading briefs vacated the Commission's order, whereupon petitioner made application to this Honorable Court for a Writ of Certiorari which was granted and the matter is now before this Honorable Court on said Writ of Certiorari.

Questions Involved.

1. Is it sufficiently alleged or shown that the trade practices complained of in the first count of the complaint are unfair competition and violative of Sec. 5 of the Trade Commission Act?

2. Do the leasing or loaning agreements complained of constitute tying contracts so called violative of Sec. 3 of the Clayton Anti-Trust Act?

Introduction.

Oil refiners and wholesale dealers in petroleum and its products are engaged in the marketing of a dangerous substance. They are liable to the consumer in damages for injury received in its use which is due to defects in the product, and this is true regardless of the number of hands through which the product passes after it leaves

the hands of the oil refiners and wholesale dealers and before it reaches the consumer.

Assuming therefore, as we must, this burden of liability for our product after it has been sold by us, we are entitled to use all reasonable means and agencies to safeguard the public and to protect ourselves from unnecessary liability. Therefore, it is safe to say that any method which we may use in good faith for the purpose of protecting ourselves and the public does not constitute an unfair method of competition.

Hence for a proper discussion of the questions herein involved requires consideration of the manner in which the sale of gasoline and other volatile petroleum products at retail is necessarily carried on, and of the equipment required for that purpose, and the use of any system is to be judged not only in the light of our obligations to the public, but is to be judged in connection with our trademark rights.

In the natural development of the oil business and the use of gas engines, it has been found absolutely essential for the safeguarding of the public and the seller, and for the convenient and economic conduct of the business, to adopt such system of handling gasoline as will to the utmost extent accomplish the above, and the present system of "curb pump outfits" is the result of such demand. The system consists of a small storage tank, properly protected to prevent evaporation, for use as a container of the product, and which is buried underground, connected with a pump and measuring device so that the gasoline may be readily drawn from the tank.

This "curb pump outfit", so called, is the necessary equipment of every "filling station", under the laws and police regulations of various states. The "outfit" is required to be kept and used by all retailers of gasoline and volatile oils, on account of the inflammatory and explosive character of the product.

The use of containers for such purposes, when the nature of the product or convenience in handling requires them, is not unusual or novel. The milkman from time immemorial has delivered his milk in cans or bottles belonging to him, and often with his name or trademark blown or stamped thereon, and allows his customers to keep and use such containers while the contents are being consumed. Penalties are provided in many States for the use of bottles or containers of any kind bearing labels or trademarks, by anyone not entitled to use them, or for placing therein any other product or a grade of product differing from the label.

Kerosene and other less volatile oils, for many years, have been sold to retailers in barrels, and direct to householders or small consumers in large cans or cases, often marked to show the manufacturer thereof, and with some guarantee as to the character of the product. The barrels and cans being the property of the refiner, wholesaler, or seller, and returned to him when the contents had been removed by sale or consumption. When the market for more volatile oils developed, for safety in their shipment and storage during sale, it was required that shipments be made in steel barrels or drums, which were and remained the property of the refiner, wholesaler, or seller, and these containers were loaned to or allowed to be kept by the retailer for storage of the oil while being sold.

The modern universal use of gasoline in automobile engines requires, for the accommodation of the public, the establishment and maintenance of "filling stations", so-called, each equipped with a storage tank or container, pump and measuring device. More than this it is necessary, for the protection of the public as to the character of the product sold, that the gasoline sold by means of such "filling stations" be of good and uniform quality.

The purchaser cannot know by inspection the quality of the product being pumped into his automobile re-

ceiving tank. He is entitled to this knowledge. The Respondent makes or handles gasoline of a certain grade, guaranteed by it to be of a uniform quality and sold under one or more of its trademarks or names, and by a careful compliance with its representations and guarantee of their product through a number of years, have established a reputation for its gasoline under the various trade names, which creates a demand for such gasoline and is a valuable asset to the Respondent and the marketer thereof. The above applies equally as well to certain other refineries and marketers.

In order that the purchaser may obtain and know that he is getting any particular grade of gasoline so sold under a trademark or name, it is necessary that there should be some sign, device or lettering upon the pump, or delivery equipment showing what or whose make of gasoline is being sold, as a guarantee of its quality. This requires a separate tank and equipment for each separate make of gasoline sold at a "filling station", if it is desired to furnish that particular brand of gasoline to the public, just, as formerly, oil sold to a retailer in steel drums, was kept therein and drawn out as sold, thereby enabling the purchaser to see what brand of oil he was buying.

Therefore, the Respondent or any refinery or marketer of gasoline of a special quality and being sold under a trademark or name, must necessarily see to it that there is a separate tank and outfit to use for the storage and sale of his product and his alone, at every filling station where he desires to have his product sold to the public as his.

This is the fundamental fact which underlies all discussion of the trade practices involved in this case, for unless a marketer does so provide for such separate tank and equipment, he cannot possibly have his product sold to the public as his, nor protect the public in the purchase of gasoline by guaranteeing it as his well-known

product, nor protect the public and himself from injury by reason of the highly inflammable nature of the product so sold.

Unless the Respondent is allowed thus to have a separate tank and equipment for the sale of its gasoline, it loses all of the value of its trade-name and reputation for square dealing and sale of a reliable product, which it has acquired by long years of upright and honest dealing with the public. This trademark, with the reputation acquired through long years of square-dealing with the public is a valuable asset to the reputation to which it is entitled.

During the last few years the use of gasoline not only in operating automobiles but likewise in stationary engines, etc., has become quite universal, thereby creating a demand for small filling stations distributed throughout the country not only at garages and other places in large cities and towns, but also at small centers of population and at convenient places along public highways where there is no village or even dense population.

By means of these filling stations, automobiles of various kinds can readily obtain an additional supply of gasoline when needed, at practically every small village or even at the roadside, by driving up to a filling station with no loss of time. Also practically all farmers and other rural population now have automobiles, and can thus, without waste of time or consumption of gasoline, obtain a supply when needed by motoring a short distance to a filling station. This rural population also have gasoline engines in use on their farms for various purposes, farm tractors, etc., and for which they need to obtain frequently a supply of gasoline which, by means of these filling stations they can readily obtain with practically no loss of time and expense aside from the price paid.

The necessity for such small filling stations must be conceded, and the great benefit to the public by this con-

venience and the great saving of time, etc., in obtaining the needed supply of gasoline is too great to be estimated. It is inconceivable that Congress intended to give power to the Federal Trade Commission, or that the Federal Trade Commission would desire, if it had that power, to deprive the public of the great convenience afforded by these small filling stations,—they are more than a convenience,—they have become an absolute necessity.

Nearly all large manufacturers and marketers of gasoline, including the Respondent, selling the same to small retailers and other consumers who necessarily need small storage tanks, pumps, etc., in handling the product, have been for several years purchasing such tanks and equipment from the various manufacturers thereof, and keeping a supply on hand for sale to retailers and consumers of gasoline or for their own use in case they find a need of them in establishing filling stations for the sale of such gasoline.

This is unquestionably a legitimate practice so far as the Respondent knows, not the subject of complaint. It is a common practice for all manufacturers or marketers of a product requiring some special equipment or device for handling or using same, to purchase and keep for sale to their customers, such special machinery, equipment or devices as may be necessary for the customer to have in order to utilize the product purchased.

Electric light and power companies, especially in small towns, usually carry a supply of lighting bulbs, heaters, toasters, chafing dishes, percolaters, stoves, and other appliances, by means of which the electric current may be utilized by their customers. Gas companies likewise buy and keep for sale to their customers, gas stoves, grates and other appliances for the consumption of gas. This puts them in competition with local dealers and manufacturers of such articles, from whom they may happen not to make purchases, but heretofore everyone has regarded such competition as desirable instead of illegal.

Suppose, also, an electric light company, in order to have householders use electricity in cooking, should purchase stoves and rent or loan them to any householder who is willing to use them, and thus consume electricity for cooking purposes,—would this be illegal or unfair competition? In fact, this is now being done in many places.

What difference does it make to the manufacturer of electric stoves whether the householder or the electric light company pays for the stove? The manufacturer has sold it, and received his money. When it furnishes a stove, the electric company has to buy and pay for it, thus making a market for the manufacturer, resulting in a benefit. Also, so long as everyone wishing the use of a stove free, is supplied, there is no ground for complaint so far as illegal competition with other sellers of fuel or heat is concerned, whether that fuel be electricity or something else.

The manufacturers and marketers of gasoline, thus purchasing tanks and equipment, sell a large part of the tanks and pumps so purchased to garages or other retailers of gasoline, and so far as the Respondent understands, no complaint is made concerning the tanks and pumps thus sold. Such a complete outfit costs about $200.

The retailer, thus owning his own tank and equipment, can, of course, sell by means thereof whatever brand of gasoline he wishes and such dealers usually have a large business and good standing in their communities, and have established a reputation for themselves as to the quality of gasoline they sell. Their word or representation as to the brand they are selling, and its quality, may be sufficient guaranty to their trade, but, nevertheless, many of them do prefer to sell some well recognized brand, and to keep its trademark over the equipment. If their business is sufficient to justify it, such retailers may have separate tanks and sell a different brand from each.

Thus it sometimes happens that in a large garage or retailing establishment, you will find a filling equipment from which some well known brand of gasoline is being sold at a certain price, and another filling equipment from which another inferior or not so well-known brand is being sold at a less price. This is beneficial to the public, not only on account of the competition, but by the knowledge given of the brand being sold.

But it would be impossible to procure the establishment and maintenance of the great number of small filling stations in the rural districts if the operator thereof was required to buy and install such tank, pump and equipment. The amount of sales from such filling station is not sufficiently large to justify the expense to the operator or he fears that the returns thereof will not be sufficient and is unwilling to incur the expense.

Therefore, the Respondent and other large marketing companies have been compelled, in order to meet the demand for such filling stations, and thus be enabled to sell their gasoline to rural consumers, to establish filling stations either owned or operated by themselves, or in some way, with their assistance. In many cases they have so installed tanks, etc., and owned and operated such filling stations, either operating the same by an employee, on a salary, or by making the operator a sales agent on a commission basis, or some other satisfactory arrangement. This involves looking after accounts and collections, and involves a liability for damages or loss through negligence in operation, making it an unsatisfactory method of maintaining such stations.

However, no complaint is made and it is admitted by the Government counsel in regard to the maintenance of filling stations thus established that no legal objection could be made unless it is to be contended that the large manufacturer and marketer of gasoline must not engage in retail trade, but must sell to local dealers exclusively.

Also, and this is the real subject of the complaint, in order to establish and have filling stations maintained, where the business is small, nearly all marketers of gasoline have adopted a method of loaning, on what is known as a lease contract, a tank and equipment to anyone who wishes to take such equipment and establish and maintain a filling station. The marketer having decided beforehand so far as he is concerned that the amount of gallonage sold at such particular point warrants the loaning of such equipment. The outfit is not given to the operator of the station, but is loaned or leased to him for a nominal rental, or none at all, under the stipulation that the tank and outfit is to be used to store the gasoline or petroleum products of the lessor only, and if the lessee ceases to buy gasoline from the lessor, or uses the tank for the storage of other gasoline, then the lessor may remove the outfit unless the lessee will pay the proper price therefor.

A suitable sign, usually lighted by electricity, is attached to the outfit, having thereon the trade-name or device designating the lessor's gasoline, by means of which the lessor advertises his brand of gasoline to the public and assures purchasers of the quality or brand being sold through such outfit.

By this method of furnishing the tank and equipment, a large number of these filling stations have been established, and are being now maintained, which would not be in existence if these loan agreements had not been made, and if the marketers are required to cease this method of establishing filling stations, it will largely prevent the further installation of such small filling stations, and will compel the abandonment of many of those now in operation and will drive the large marketer to the establishment of the so-called "service stations", this necessitating the purchase of a suitable lot, erection of a building thereon and the installation of pump outfits. This method entailing an expenditure from two to twenty thousand dollars for each station, and their establishment

only in large and well populated communities. It is admitted by many of the witnesses in the case, that this could be done by the large marketers, whereas the small marketer would be unable to compete with this practice and consequently would have a corresponding decrease in the amount of his business and the convenience of the traveling public be seriously interfered with.

The marketers have invested a large amount of capital in these tanks and outfits, the Respondent's investment amounting to approximately Three Million Dollars, and if required to cancel these loan agreements and remove this equipment, will necessarily suffer great loss, as the equipment, when taken out, is second hand and would not sell for enough to pay the cost of removal.

It is, therefore, earnestly contended that these loan agreements are practically a necessary result of the modern development of the gasoline business, and are an application to this business of the ordinary and long-used method of sellers furnishing containers. The abolition of such agreements, instead of being in the interest of the public, would have serious results in the opposite direction, and would cause the abandonment of many small filling stations now in existence, and prevent the installation of additional stations in the future. In fact, it would practically compel large marketers to cease trying to sell their gasoline under their own brand direct to consumers by filling stations, and would confine the sale thereof principally to local dealers or middlemen, or would compel the establishment of highly expensive and costly service stations.

It should always be kept in mind that the refiners or marketers would greatly prefer to have such filling station owners buy and own their own tanks and pumps, which is preferable, so far as the marketer is concerned from several standpoints, one of which is that it would relieve him of all danger of liability on account of any

accident and injury to persons or property through said equipment or the manner of its installation. But the marketers wish to sell their brand of gasoline under its trade-name and to furnish the public an opportunity to buy it as such.

Therefore, if any retailer or filling station operator, or prospective operator, prefers to take a loan of a tank instead of buying one, he is allowed to do so and all are treated alike in this respect. There is nothing secret, nor any misrepresentation whatever, either to the retailer or the public. The advertisement which the lessor of the tank derives from its use is worth the full rental value of the equipment or more.

The objection to this loaning of tanks and pumps seems to be three-fold:

(*a*) In that it is claimed to lessen competition or is unfair competition with respect to pump manufacturers and

(*b*) That it also is unfair competition with respect to other oil companies.

(*c*) That the retailers of gasoline through curb pumps are monopolized by the oil company loaning the outfit.

BRIEF OF THE ARGUMENT.

I.—The "trade practice" complained of is not injurious to a "Public Interest" as contemplated by the Federal Trade Commission Act.

II.—The "Trade practice" complained of is not "unfair competition" as is meant by the Federal Trade Commission Act.

III.—The Leasing and Loaning agreements complained of do not constitute "tying contracts" within the purview of Section 3 of the Clayton Anti-Trust Act.

IV.—The Leasing and Loaning agreements do not have the effect of substantially lessening competition or of tending to create a monopoly within the intent of Section 3 of the Clayton Anti-Trust Act.

V.—The order to "cease and desist" is at variance with the allegations of the complaint and the Report and Findings and therefore is illegal.

VI.—The order to "cease and desist" is in other respects illegal.

VII.—Conclusions.

ARGUMENT.

I.

The trade practice does not involve nor is it injurious to a "Public Interest".

(a) Meaning of the words "Public Interest".

The Century Dictionary defines the word "public" as follows:

> "Regarding or directed to the interests of the community at large and not limited or confined to private, personal or selfish matters or interests."

A definition of the word "interest" by the same authority is given as "That which concerns or is of importance to".

Combining the foregoing definitions gives us as a definition of "Public Interest" the following:

> "Regarding or directed to that which concerns or is of importance to the interests of the community at large and not limited or confined to private, personal or selfish matters or interests."

(b) The evidence fails to show that "Public Interests" have been injured.

The general public that are affected by the Respondent's practice divides itself into two classes:

FIRST: Those citizens who are purchasers or users of tanks, etc., and

SECOND: Those citizens who are users of gasoline, etc., in automobiles, etc., and stationary gasoline engines for combustion purposes.

The foregoing classes will be treated together.

Only those who are in need of tanks, etc., for the storage of gasoline for their own purposes or to sell the same at retail are concerned in the use of said tanks. No evidence has been adduced to show that respondent holds a monopoly or is likely to acquire one of the tanks, etc., and by reason thereof controls the price of the same. There is nothing to show that in cases of sales of tanks, etc., such persons have been compelled to pay an exorbitant or unreasonable price or that they were unable to procure a tank, etc. Rather the evidence discloses the fact that the users have been enabled to obtain pumps on such terms as were particularly advantageous to them, thereby securing to them a class of customers who were likely to purchase other articles sold by such users (Record, Vol. III, p. 56); that many users were able to obtain a tank, etc., who otherwise by reason of the cost thereof would never have been in a position to obtain one (Record, Vol. III, p. 112); such persons by getting such tanks, etc., have been safeguarded from the dangers of fires and explosions which are always a possibility when handling gasoline in the old forms of open tanks, buckets and funnels (and the likelihood of damage suits therefrom); that they are a valuable business asset to the retailer by reason of the trade-mark and name of the lessor and the advertising value thereof (Record, Vol. II, p. 192).

It is demonstrated that they obtain gasoline of a good uniform quality at fair prices (Record, Vol. III, p. 195); that they are furnished with better service (Record, Vol. III, p. 71); that they are protected to the best possible degree from the dangers of fire and explosions (Record, Vol. III, p. 253); that the tanks, etc., are of great convenience to them (Record, Vol. II, pp. 192, 491, 495, 496; Vol. III, pp. 56, 57, 71, 128); that the tanks, etc., are the most convenient and inexpensive way to serve the public (Record, Vol. II, pp. 232, 438, 486, 515, 516, 522); that the trade-mark or name displayed on the tank, etc., is a guarantee to them of the quality of the product (Record,

Vol. II, pp. 192, 303, 492, 511, 541, 559; Vol. III, p. 30). From this it can readily be seen that instead of being injurious to the "public interest", the practice has been and is of inestimable value.

Before passing from the consideration of this point it is suggested that the matter is different from that of the ordinary unfair competition case in equity, where it is only necessary that the Court find that the plaintiff is injured by the acts of the defendant. In the present proceeding the public interest must be involved and such interest necessarily is that as set forth in the foregoing definition. Worthy of consideration in connection herewith is the following extract from the Court's opinion in *re Federal Trade Commission* v. *Gratz et al.*, 258 Fed. 314:

> "It seems to us that unfair methods of competition between individuals are not contemplated by the act. Congress could not have intended to submit to the determination of the Commission such questions as whether a person, partnership or corporation had treated or bribed the employes of a competitor, for the purpose of inducing them to betray their employer. We think the unfair methods, though not restricted to such as violate the Anti-trust Acts, must be at least such as are unfair to the public generally. It seems to us that Section 5 is intended to provide a method of preventing practices unfair to the general public and very particularly such as if not prevented will grow so large as to lessen competition and create monopolies in violation of the Anti-trust Acts. Such a preliminary inquiry and determination constitutes a most important supplement in carrying out the public policy which those acts are intended to vindicate. This view is confirmed by the language of the section: 'Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been using any unfair method of competition in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be

to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and place therein fixed at least thirty days after the service of said complaint.'

"No authority is given to any individual to present his grievances, and the Commission is to interpose only in the interest of the public. . . .

"Counsel for the commission calls our attention to the opinion of the Circuit Court of Appeals for the Seventh Circuit, *Sears, Roebuck & Company, Petitioners*, vs. *Federal Trade Commission, Respondent*, 258 Fed. 307. The practice there prohibited as unfair was extensive advertising containing false and misleading statements calculated to deceive all purchasers and to discredit all competitors. It was clearly a method unfair to the public generally.

"As we think there is no evidence to support any general practice of the respondents to refuse to sell ties unless the purchaser bought at the same time necessary amount of the American Manufacturing Company's bagging, and that the commission has no jurisdiction to determine the merits of specific individual grievances, the order is reversed."

In affirming the decision of the lower Court in this case the United States Supreme Court declared:

"Nothing is alleged which would justify the conclusion that the public suffered injury, or that competitors had reasonable ground for complaint."

II.

The Trade Practice complained of is not "unfair competition", as is meant by the Federal Trade Commission Act.

(a) *Meaning of the words "Unfair Competition".*

The Act does not define what unfair methods of competition are. As urged before, the present proceeding is to be determined upon different principles than that of the ordinary unfair competition case in equity cases. There is not required to be present in such cases the "public interest" that is required in the present case. The Court in the Gratz case says:

> "The words 'unfair method of competition' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine, as matter of law, what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

In the *Sears Roebuck* case, *Sears, Roebuck & Co.* v. *Federal Trade Com.*, 258 Fed. 307, the court says:

> "On the face of this statute the legislative intent is apparent. The Commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. The Commissioners, representing the Government as *parens patriæ* are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those

trade practices that have a *capacity or a tendency to injure competitors directly* or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common law cases. But the restraining order of the Commissioners is merely provisional. The trader is entitled to his day in court, and there the same principles and tests that have been applied under the common law or under statutes of the kinds hereinbefore recited are expected by Congress to control. This *prima facie* reading of legislative intent is confirmed by reference to committee reports and debates in Congress, wherein is disclosed a refusal to limit the Commission and the courts to a prescribed list of specific acts. Cong. Rec., 63rd Cong., 2nd session, pp. 13, 18, 533, 12246. And this interpretation is not affected by the subsequent adoption of the Clayton Act, October 15, 1914, condemning certain specific acts."

An examination of the proceedings in the Senate at the time this statute was under consideration discloses, to some extent at least, the broad scope which Congress intended the act should have.

"Every practice and method between competitors upon the part of one against the other that is against public morals." Senator Newlands.

"It is that competition which is resorted to for the purpose of destroying competition, of eliminating a competitor and of introducing monopoly . . . The unfairness must be tinctured with unfairness to the public, not merely with unfairness to the rival or competitor." Senator Cummins (pp. 12, 150).

"Unfair competition means what the people who use the English language commonly believe that those words mean." Senator Cummins (p. 13879).

Senator Walsh gave the term "the meaning which it has to-day in common parlance and the accepted significance that it has in the literature of this our day" (p. 14138).

"Competition is unfair when it resorts to methods which shut out competitors who by reason of their efficiency might otherwise be able to continue in business and prosper. Without the use of unfair methods no corporation can grow beyond the limits imposed upon it by the necessity of being as efficient as any competitor." Senator Hollis (p. 1322[illegible]).

And Former Federal Trade Commissioner Joseph E. Davis sets forth in "Trust Laws and Unfair Competition" a list of acts judicially decided as unfair competition, namely:

"(*a*) Inducing breach of competitors' contracts (*See I of Appendix, pp. 51-53, Brief*);

(*b*) Enticing employees from the service of competitors (*See II of Appendix, p. 53, Brief*);

(*c*) Betrayal of trade secrets (*See III of Appendix, p. 54, Brief*);

(*d*) Betrayal of confidential information;

(*e*) Appropriation of values created by competitors' expenditures;

(*f*) Defamation of competitors and disparagement of competitors' goods (*See IV of Appendix, pp. 54-55, Brief*);

(*g*) Misrepresentation by means other than words;

(*h*) False claims to testimonials;

(*i*) Intimidation of competitors' customers by threats of infringement suits;

(*j*) Combinations to cut off competitors' supplies or to destroy their market (*See V of Appendix, p. 55, Brief*);

(*k*) Intimidation, obstruction, and molestation of competitors or customers (*See VI of Appendix, p. 56, Brief*);

(*l*) Preventing the sale of competing goods by demanding contracts for exclusive dealing;

(*m*) Bribery of employees (*See VII of Appendix, p. 56, Brief*);

(*n*) Competing with purchaser after the sale of business and good will;

(*o*) Passing off the goods of one manufacturer or dealer as those of another" (*See VIII of Appendix, pp. 56-62, Brief*).

The Government having before it all of the foregoing opinions of courts evidently undertook to draw up the decree in *U. S. v. F. S. Bowser & Co., et al.*, U. S. Dis. Ct., Ind., in such a manner as would embrace the complete list as given by Mr. Davies, and such decree in the consideration of the present case is worthy of the attention of the Court. (See No. IX of Appendix, pp. 62-63, Brief.)

The Court in the Gratz case places unfair methods in two classes, *viz:*

(*a*) Those opposed to good morals because characterized by deception, bad faith, fraud, or oppression; or

(*b*) Those against public policy because of their dangerous tendency unduly to hinder competition or create a monopoly.

(b) *The complaint fails to sufficiently allege necessary facts to show "unfair competition".*

Necessarily to have drawn a sufficient complaint it was incumbent upon the Petitioner to have alleged the facts upon which it based its claim of unfair competition, and such facts to have been sufficient should have shown how the practice was against good morals; what deception, bad faith, fraud or oppression was used by Respondent; or in what the practice was against public policy because of its dangerous tendency unduly to hinder competition or create a monopoly.

Count one of the complaint contains a general statement that the leasing of pumps for a nominal consideration, etc., is "with the effect of stifling and suppressing competition", but fails to show facts that the practice has

such an effect or that show it injures the public. The allegation is that by reason of this method, Respondent's competitors have lost customers.

Respondent says that count one of the complaint should be dismissed.

(c) *The evidence fails to establish the charge of unfair competition.*

Looking at the question raised by the curb pump outfits with the foregoing decided cases and definitions in mind, it is important to note that the use of these outfits, which is now general throughout the country, is not the result of an attempt on the part of a few of the oil companies to lessen competition, but is in use because it is the most efficient and practical method for distributing gasoline to the consumer. If this be the fact, it of course follows that it is to the public interest that the use of this system should not be interrupted.

It might well be, however, that, while the system is a desirable one, Respondent's use of it is unfair. This question must be considered in the light of all of its legal obligations to the public connected with its sale of gasoline.

Respondent is marketing a dangerous substance. It is liable to the consumer in damages for injury received in its use which is due to defects in the product, and this is true regardless of the number of hands through which the product passes after it leaves you and before it reaches the consumer. This is specifically laid down in connection with oil products in *Elkins Bly & Co.* v. *McKean*, 79 Pa. St. 493-502; approved in *Waters-Pierce Oil Co.* v. *Deselms*, 212 U. S. 159-179. (*See also No. X, Appendix, pp. 63-64, Brief.*)

The evidence shows that the Respondent purchased tanks with pump equipment from responsible pump manufacturers (Record, Vol. II, pp. 505, 506); that such tanks, etc., were sent to Respondent's warehouse in different

localities (Record, Vol. II, p. 506); that upon request a pump was taken out of its warehouse and installed at customer's place of business (Record, Vol. II, p. 506); that generally an agreement or lease was signed, which agreement contains a condition regarding lessee or loanee not to store or handle products other than those of Respondent in said tanks, etc. (*see copy agreement No. VI of Appendix, pp. 65-67, Brief*); that the reasons for the use of said tanks, etc., were, first, increase in consumption of gasoline by increasing the number of gas engines being used (Record, Vol. III, p. 278); second, public convenience (Record, Vol. II, pp. 192, 491, 495, 496; Vol. III, pp. 56-57, 71, 128); third, economic changes (Record, Vol. III, pp. 253-57); fourth, protection to public and seller (Record, Vol. II, pp. 540-41); fifth, protection to Respondent in its trading marks and trade names (Record, Vol. II, pp. 192, 303, 540; Vol. III, pp. 253-57).

Neither the complaint nor the evidence shows that the Respondent did not properly obtain their tanks, etc., as merchants usually do. In fact the proof offered shows that the pump manufacturers have two methods of selling, one through salesmen throughout the field and the other through direct sales in bulk to oil companies or other large purchasers (Record, Vol. III, pp. 182-184).

The proof shows that the oil companies kept some tanks, etc., on hand so that they could easily furnish a retailer with one when needed (Record, Vol. III, pp. 253-257); neither is it alleged or shown by the evidence that Respondent had a monopoly of either tanks, pumps or any part of the equipment thereof; or had the ability, purpose or intent to acquire one; there is nothing in the complaint or proof but what shows Respondent acting independently used its lawfully acquired property in its usual course of business without deception, misrepresentation or oppression, and there is nothing in the evidence to show that the effect of the trade practice may be or is to substantially lessen competition. On the contrary, the

evidence overwhelmingly shows that such practice makes for competition (Record, Vol. II, pp. 18, 19, 62, 90, 95, 96, 124, 129, 158, 214, 233, 234, 236, 237, 283, 286, 258, 304, 361, 362, 394, 395, 418, 451, 496, 511-518; Vol. III, pp. 163-170, 258-260); is the best means for a new concern to get started (Record, Vol. II, pp. 334, 362, 424, 438, 443, 566; Vol. III, pp. 69, 198, 258-260, 282-283); and that many companies have been able to build up a surplus from such practice (Record, Vol. II, pp. 147-149, 152).

In the further discussion of the above point, it is necessary for us to see—

The Effect of Respondent's Trade-Mark Rights on the Question of Fairness.

Respondent's use of the tank, etc., system is to be judged not only in the light of its obligations to the public, but it is to be judged in connection with its trade-mark rights. It has important property rights in the name "Standard" as applied to gasoline; definite privileges are granted it by law in the protection and use of that mark. It has created a demand for "Standard" gasoline by advertising, by fair dealing, by good quality. The public seeks its product under that name or other trade names. It has a right to use all reasonable precautions to see to it that the public obtains its product in the condition in which it wishes them to receive it. It has a right to use a trade-mark in selling its goods. It has a right to the entire and exclusive use of that mark in its particular line of business. If that name is discredited it suffers injury. Respondent has, therefore, a right to use all necessary measures to protect it.

Its gasoline is delivered to the consumer in the tank on his premises. It is practically the same as if Respondent delivered it to him in an original package. The pump bears its name and trade-mark. Under these circum-

stances it has a right to prescribe definite conditions under which the gasoline shall be sold.

A similar situation arises in connection with the bottling of drinks by others than the manufacturers of the syrups which are the basis of the drinks. In the case of *Coca-Cola* v. *Butler*, 229 Fed. Rep. 224 (1916), the defendant was enjoined from putting the trade-mark "Coca-Cola" on a carbonated drink bottled by the defendant but made with genuine Coca-Cola syrup. One of the reasons given for this decision and other similar decisions referred to in the opinion in this case is that unless the manufacturer can control the bottling he cannot guarantee that the bottled drink is the genuine article prepared by him, for which he is responsible to the public for the reason that it bears his trade-mark. It might be added that otherwise the manufacturer could not be sure that the bottled drink is a safe beverage for the use of the public.

There are a number of cases to this same effect, most if not all of which are referred to in the opinion in the Butler case.

This same rule as to the use of trade-marks has recently been considered by the House of Lords in the case of *Spalding* v. *Gamage*, 32 Rep's. Patent Cases, 273 (1915). In this case Spalding, the sporting goods dealer had been selling foot-balls under the name "Orb". The foot-balls turned out to be unsatisfactory, and Spalding sold the entire lot to a secondhand dealer. Subsequently, the defendant purchased these goods from the secondhand dealer and began to sell them under the name "Orb". An injunction forbidding the defendant to use plaintiff's trade-mark in connection with these foot-balls, although they had actually been made by the plaintiff, was upheld by the House of Lords.

In *Krauss* v. *Peebles*, 58 Fed. Rep. 585, the plaintiff sold whiskey in bulk to the defendant, who bottled it and put on the bottles labels used by the plaintiff on whiskey which he bottled himself.

Taft, *J.*, held:

> "It is doubtful whether the sale of merchandise in bulk under the trade-mark of the maker carries with it, as incident thereto, the right in the vendee to use the same trade-mark as a trade-mark on smaller retail packages" (p. 501).

In *Russia Cement Co.* v. *Katzenstein*, 109 Fed. Rep. 314, the plaintiff sold glue of various grades. The best grade it sold under the name "Lee Pages Liquid Glue". The lowest grade it sold as "Lee Pages Fish Head Glue". Defendant bought plaintiff's cheapest grade in bulk, bottled it and resold it under the name "Lee Pages Glue", and was enjoined from so doing.

These cases show the importance which the courts attach to securing to trade-mark owners the control of their trade-marks.

Respondent's gasoline is offered to the public, as was said above, in tanks bearing its trade-mark. It is justified, under these rules, in employing whatever means are necessary to enable it to deliver its product to consumers in the condition in which it desires to have them receive it. If its gasoline is not sold from tanks used only for its product and installed by it, its service to the public will prove unsatisfactory and the reputation of its gasoline will suffer, and it is therefore justified in using such means to protect its trade-mark property rights.

In passing such statutes as the Federal Trade Commission Act and the Sherman Law, it was not the intention of Congress, apparently, to override the fundamental rights which men enjoy under the law—merely to prevent restraint of trade and unfair competition. Undoubtedly it is possible for one deliberately setting out to restrain trade or to act unfairly, to make use of rights which he enjoys under the law to bring about these very ends which are illegal; but, in the absence of specific proof that the acts in question are committed with such

intent, fundamental rights, such as petitioner's rights which have been referred to, are not affected. This is evident from the case of *United States* v. *Colgate & Co.*, recently decided by the United States Supreme Court (250 U. S. 300). In this case the court holds:

> "In the absence of any purpose to create or maintain a monopoly the (Sherman) act does not restrict the long-recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."

In this case the Government's object was to show that the defendant was guilty of a restraint of trade in refusing to sell customers who failed to resell its goods at prices set by it. The court has held in other cases that price maintenance may be a restraint of trade. In this case the Government charged in its indictment that Colgate & Company was maintaining prices by exercising this right to refuse to sell. The court quoted the decision of the district judge, as follows:

> "This, at the threshold, presents for the determination of the court how far one may control and dispose of his property; that is to say, whether there is any lawful limitation whatever, if the proceeds in respect thereto in a lawful and *bona fide* manner. That he may not do so fraudently, collusively and in unlawful combination with others may be conceded. But it by no means follows that, being a manufacturer of a given article, he may not, without incurring any criminal liability, refuse absolutely to sell the same at any price, or sell it at a named sum to a customer with the understanding that such customer will resell only at an agreed price between them and should the customer not observe the understanding as to retail prices, exercise his undoubted right to decline to further deal with such persons."

Having in mind the foregoing decisions defining unfair competition, Respondent urges that neither the complaint itself nor the evidence offered in support thereof shows that the acts of the Respondent are within or analogous to the foregoing definitions and cases, although petitioner by its order, unwarranted and unfounded, attempts to find that the Respondent is guilty of unfair competition by preventing the sale of competing goods by demanding contracts for exclusive dealing. This latter question will be argued in Point III. It is proper to asume that no type of the foregoing methods of unfair competition is present in this case.

III.

The Leasing and Loaning Agreements complained of do not constitute "tying contracts" within the provision of Section 3 of the Clayton Anti-Trust Act.

(a) *What are "Tying Contracts" so called.*

Sec. 3 of the Clayton Anti-Trust Act forbids a company or corporation to "lease" or "make a sale or contract . . . on the condition . . . that the lessee or purchaser thereof shall not use or deal in the goods" of a competitor "where the effect of such lease, sale or contract for sale, or such condition, agreement or understanding may be to substantially lessen competition or create a monopoly in any line of commerce."

Courts have not in their decisions given any general definition of "tying contracts", but rather have taken the definition as given in the act as a square to be applied to the facts in each particular case. If the facts fall within the rule the practice is restrained, otherwise not.

(b) *The evidence fails to show that the agreements are "tying contracts" violating the law.*

The second count of the complaint charges that said leasing or loaning contracts fix the price charged therefore on the condition, agreement or understanding that the lessee thereof *shall not purchase or deal in the products of a competitor or competitor's Respondents.* The record shows that the retailer may purchase products of other oil companies or wholesalers than Respondent, may sell such products, may lease, loan or buy tank equipments, but that so long as the retailer has the tank equipment of the Respondent on the lease or loan agreement, such retailer shall not dispense through such leased equipment the products of any other oil company or wholesaler.

The Commission evidently recognized that the proof failed to follow the charges in the second count, but expected to reach the same result by incorporating in the order to cease and to desist that part which restrains Respondent from "entering into contracts or agreements with dealers in its petroleum products or from continuing to operate under any contract or agreement already entered into whereby such dealers agree or have an understanding; and that as a consideration for the leasing to them of such pumps, tanks and their equipment the same shall be used only for storing or handling the products of petitioner and from doing anything having the same unlawful effect as that resulting from the practice herein prohibited, and by reason of which this order is made."

The so-called tying contracts as used by the respondent do not prohibit the lessee from handling, using or dealing in the products of competitors (See No. XI of Appendix, p. 65, Brief). They require such equipment to be used solely for the storage and handling of motor gasoline purchased by lessee or loanee of the lessor

(Record, Vol. III, pp. 253-257). The lessee or loanee is not restricted to only deal in the products of the lessor, and can, without any right or on the part of the lessor, deal with as many oil companies as he may desire, but the lessor says that such lessee shall not dispense with competitor's product through lessor's tank, etc. To dispense with another's motor gasoline or products, it is necessary for lessee to use another and different pump, which said lessee may either purchase himself or lease from such other competitor (Record, Vol. II, p. 192).

In many cases a retailer only uses one pump, etc. (Record, Vol. III, p. 70), and generally remains with one wholesaler (Record, Vol. III, p. 70). This condition has not been brought around by the leasing practice, for prior to the installation of such practice wholesalers and oil refineries were able to keep as a general rule retailers, even where such retailers own their own pumps (Record, Vol. III, p. 70).

Then again, the retailer is not compelled to lease a pump, etc., from Respondent in order to buy Respondent's products. He may buy and install his own equipment and the wholesaler will sell to him notwithstanding such retailer may buy from other wholesalers and mix the several brands of gas so purchased (Record, Vol. III, pp. 273-278). But Respondent will object to the retailer placing any sign on the pump advertising the name or brands of the Respondent, for by the use of the mixture, the public will not get the special brand of Respondent; and to permit the placing of a sign under such circumstances, would be a fraud upon the public, not only on part of the retailer but on part of the wholesaler as well.

The Legal Character of Curb Outfit Contract.

Contracts under which sales or leases are made, which contain conditions regulating the use of goods sold or leased, are generally upheld.

Robert H. Ingersoll & Bro. vs. *Hahne & Co.*, 108 Atl. 128;

U. S. vs. *Standard Oil Co.*, 173 Fed. 177;

Whitewell vs. *Continental Tobacco Co.*, 125 Fed. 454;

Standard Fashion Co. vs. *Magrave Houston Co.*, 259 Fed. 793;

U. S. vs. *Basic Products Co.*, 260 Fed. 472;

U. S. vs. Joint Traffic Ass'n, 171 U. S. 505;

U. S. vs. Whiting, 212 Fed. 456;

Sears Roebuck & Co. vs. *Federal Trade Commission*, 258 Fed. 207;

Weiboldt vs. *Standard Fashion Co.*, 80 Ill. App. 67;

Wood vs. *Hart*, 50 Neb. 497, 70 N. W. 53;

N. Y. Trap-Rock Co. vs. *Brown*, 43 Atl. 100.

Covenants in leases of saloons that the lessee shall sell only the beer of the lessor have been held good.

Ferns v. *American Brewing Co.*, 155 Ind. 539 (1900).

Joseph Schlitz Brewing Co. v. *Nielson*, 77 Nebr. 868 (1906).

Schlitz Brewing Co. v. *Irari & Contorla*, 179 See App. 269 (1913).

Christian Feigenspan v. *Nizolek*, 65 Atl. 703 (N. Ch. 1907).

18 Halsbury's Laws of Eng. 573.

The same is held of sale and lease of land. Where land was sold with the covenant that the vendor was to

have the exclusive right to sell beer to any public house erected on the land, the covenant was enforced.

Catt v. *Tourle*, L. R. 1869, 4 Ch. App. 654.

The case specifically held that the contract was not in restraint of trade.

Respondent owes an important duty to the public in connection with its sale of gasoline. It has a right to take all appropriate measures to enable it to fulfill that duty. It owns a very valuable trade-mark. It has the right to regulate the sale of its goods under that trade-mark, so far as is necessary to protect its good-will in that mark.

In exercising these rights, respondent imposes no restrictions on the dealer which prevent or discourage his operating his own tank or tanks furnished by competitors. It does not, therefore, restrain or limit the opportunity of dealers to supply to the public any and all grades of gasoline which he desires to handle, either in his own tank or in tanks furnished by the oil companies.

It is submitted from the foregoing that the agreements in question do not come within Sec. 3 of the Clayton Anti-Trust Act, as it is generally understood and has been discountenanced by the courts.

IV.

The tying contracts, so called, do not have the effect of substantially lessening competition or of tending to create a monopoly within the intent of Section 3 of the Clayton Anti-Trust Act.

(a) *As to the complaint. Count Two.*

Again respondent fails to allege the facts necessary to show how the practice lessens competition or tends to create a monopoly. It is therefore insufficient and on its face should be dismissed.

(b) *The evidence fails to show that competition is lessened or that there is a tendency to create a monopoly.*

The testimony has proven that by reason of the increase in use of gasoline better facilities for storage, safety and service were necessary to meet increasing demands; that competition in the sale of petroleum products has been greatly stimulated by their use; that retailers obtain an advertising medium through the use of the oil companies' trade marks and names; that the system has increased the number of pumps in use, the result of which has been to increase the sales of the pump manufacturers; pump manufacturers' business has continually increased each year. It is admittedly the easiest way for a new oil company to start in and obtain a business immediately. More gasoline has been sold through the system; that it has enabled oil companies to find an outlet for their large gallonage; that it enables all oil companies to trade mark their gasoline; that competition is one of the causes of the leasing and loaning system; that while a pump salesman may lose one customer by the practice, it makes him go out and get another; that the oil com-

panies buy their pumps in large quantities from the pump companies; that the majority if not all of the oil companies have been able to build up surpluses; that it has not driven any oil companies out of business.

Of the witnesses on behalf of the Commission, George F. Fox (Record, Vol. II, p. 33) admits that special containers are necessary, that it was the former practice to loan barrels and drums—that this was an old practice, and that dealers in other products, such as milk, loan bottles containing their product.

George E. Buck (Record, Vol. II, p. 230) says the practice began about six years ago, when the curb pump came into use.

Harry H. Willock (Record, Vol. II, p. 272) testifies of the old practice of loaning barrels and drums as containers and that his company still ships in drums and loans them to retailers as containers, and that it is the practice for the wholesaler to have his label on these containers (Record, Vol. II, p. 275); that the custom of loaning barrels is "as old as the oil trade and as old as any trade in liquids. There was no way to handle those liquids but by the barrel and that is the way the return package has always been, in every line. It is in the egg case, it is in everything else, any sort of business" (p. 290). Originally, the garages, like the original automobiles, were pretty bum affairs and sold gasoline out of a steel barrel on tap. This was injurious, and the tank and pump is the only proper way of dispensing gasoline. Garages should be compelled by law to use it (p. 278).

Clarence Shock (Record, Vol. II, p. 302) testifies the practice was for the wholesaler to loan the old barrel and drum to the retailer.

W. J. Metzel (Record, Vol. II, p. 326) testifies that the loaning of equipment is the general practice of all oil companies; that it is the exception when they do not engage in this uniform practice.

Geddings Cushman (Record, Vol. II, p. 439) testifies that this practice of loaning pumping equipment supersedes the old practice of loaning barrels and drums; that under the old practice the name of the wholesaler was labeled on the drums just as it is to-day labeled on the pump.

C. M. Carpenter (Record, Vol. II, pp. 119-129) testifies that in the sparsely settled territory of Vermont and New Hampshire the Standard Oil Company of New York in some places has no competition, but that they go in and establish curb pumping stations in little stores and places in the country, at farm yards, anywhere along the way where they think there is a possibility of distributing any gasoline; and (on p. 121) that there is not enough business in some of these localities to make competition profitable, although competition is now developing there by the Texas Company coming in (p. 122).

William R. King (Record, Vol. II, p. 509), whose testimony particularly applies to the present petitioner, testifies that a special container of some kind is absolutely necessary for the safe and economical dispensing of gasoline; that the original containers were wooden barrels, afterwards steel drums, which were loaned by the wholesalers; at least 90 per cent. were so loaned, and this loaning is still in vogue when gasoline is shipped in drums. That (p. 510) the increased demand caused the present pumping equipment to be adopted as the only proper container or facility for dispensing gasoline to automobiles; that the system of loaning barrels and drums to retailers was applied to the new equipment as soon as it came into use. These pumps came into use about 1914 and 1915, and the loaning system began at the same time. Also (pp. 515-516), that he pays no attention to competition in making installations. The purpose is to get their gasoline to the public in the most economical way, and pumping equipments are installed and

loaned to retailers in districts where nobody is selling gasoline but his own company. The increase in the use of gasoline in these outlying districts, where formerly there was no supply, is wonderful. Applications are received asking that installations be made, and his company investigates, and if they believe there will be sufficient business, install the equipment, loaning it if necessary in order to have it installed.

The testimony of Frederick D. Gatchell (Record, Vol. II, pp. 469-474) is to the same effect, and (p. 477) he says that this loaning system came in "just like all things that come along, new propositions that come along, improved methods of handling, and we adopted it as something that was necessary to carry on our business."

To the same effect is the testimony of C. E. Young (pp. 490-491), that when these pumping equipments came into use, the former practices of loaning containers was applied to this equipment.

Also see testimony of R. D. Leonard to the same effect (p. 587).

George F. Fox (Record, Vol. II, pp. 46-47) says the practice has resulted in more garages selling gasoline than otherwise would do so. Many little garages now have pumps that would not put them in otherwise.

H. E. Mills testifies practically to the same effect (Record, Vol. II, p. 69).

Edward J. Suor (Record, Vol. II, p. 209) testifies that competition is increasing of late, considerably and consistently.

Walter H. Goodrich (Record, Vol. II, p. 214), that more companies are operating in his field than before; that the larger companies are branching out and competing where they did not compete before.

George E. Buck (Record, Vol. II, p. 233), that the loaning system has likely caused curb pumps to be installed which otherwise would not have been; that at

the time the loaning began, his company and the Standard Oil Company of New York were the only competitors in his territory; that since the loaning began, the Gulf Refining Company and the Texas Company are competing and using the loaning system.

Harry W. Willock (Record, Vol. II, p. 261) says it causes too many pumping equipments to be installed; that (p. 269) in many cases the operator in the country would not install equipment if it were not loaned to him; that (p. 283) there are many more companies operating in his district than formerly. Originally, he had no competition; then the Atlantic Refining Company came, and one by one added on; that (p. 286) there are too many little fellows in the business, caused by this practice.

Clarence Shock (Record, Vol. II, p. 307), that the loaning system causes more stations to be established than the agency system would; that (p. 299) it is a good way for the little fellow to compete with the expensive service stations of big companies.

W. J. Metzel (Record, Vol. II, p. 335), that at one time his company had all the local trade in many localities, their only competitor then being the Standard Oil Company; now there is plenty of competition, "the woods are full of them" (p. 338). Very often, the only way a new company can get started is to loan equipment to a new garage man, or new retailer (p. 334). More oil companies are engaged in the business than two years ago—the number of companies and the amount sold has increased. This increase has been since the loaning system began (p. 335).

C. B. Matthews (Record, Vol. II, p. 352) says there are more companies operating in his territory than a few years ago, although he does not think the loaning system had much to do with it. Those that were only operating locally, and those that were only operating in other things, have pushed into gasoline, and the big

companies are reaching out to the consumer. They use this loaning system to push their business.

P. C. Hubbard (Record, Vol. II, p. 361) says competition in his territory is increasing of late years—more companies are engaged in the business; that the loaning system is a good lazy man's way of getting business—that it is the easiest way a new man can get his product to the public and develop trade (p. 362).

George J. Moore (Record, Vol. II, p. 394) says there is more competition in his district than formerly; a few years ago the Atlantic Company had practically a monopoly, it was selling to the consumer under its trade name to agencies; subsequently it adopted the loaning system instead of the agency system. It did this in sections where there was no competition. There is now competition practically everywhere in this territory—Pennsylvania and Ohio; the Atlantic Refining Company (p. 395) had practically a monopoly in many localities; other companies have been coming in by using this system, and now there is no locality where there is not competition.

Giddings Cushman (Record, Vol. II, p. 438) says that the loaning system is a good way to get business in a new territory and against established business.

The testimony of Mr. William R. King, head of the Merchandising Department of Standard Oil Company of New York, is most definite and conclusive on this subject; in Record, Vol. II, page 515, he says that the loaning practice has largely increased the number of installations, and (p. 517) that it has increased competition; that (p. 518) he counted the companies operating in his district at the end of 1915 and there were then 113. At the last count taken of them in the year 1919, there were 144. The increase has been both of large companies and local companies operating in particular localities; also, the larger companies have increased the volume of sales. On page 519 he mentions the Sinclair Oil Company, which has recently come into his territory.

Richard D. Leonard, general manager of domestic sales of Atlantic Refining Company, testifies to the same effect, and illustrates the effect of the loaning method, and says (Record, Vol. II, p. 566) that the increase in the number of people going into the business is most noticeable as is also the expansion of the business of the small man who was formerly doing a localizing business, who are now branching out and doing business at several points. He illustrates by the case of the Maloney Oil Company, which, four years ago, were doing business practically exclusively in Scranton, Pa. To-day, through the medium of loaning and leasing outfits, they are doing business in Wilkesbarre, in Shamokin and in Pottsville. They are now competing with his company in these places where they were not formerly competitors. He also illustrates how competition develops under this system, by his testimony in Record, Vol. II, pages 555-556, where in the Wilkesbarre territory his company were supplying the two garages in the town located slightly off the main street. The sales from these garages fell off and upon investigation it was found that the Maloney Oil Company, the Pure Oil Company and the Gulf Refining Company had been good enough merchants to install loaned equipments on the main street of the town and were getting the business. The public would not go to the misplaced garages; therefore, in order to retain and get their share of the business, his company installed two curb pumps, one at each end of the town so as to catch the trade.

The testimony of Mr. Gatchell of the Texas Oil Company and Mr. Young of the Standard Oil Company of New Jersey is the same as the testimony of Mr. King and Mr. Leonard.

Charles Frech (Record, Vol. III, pp. 62-91), says it is a good practice (p. 63); that those owning their own equipment usually buy from one dealer, and it is

practicaliy impossible to get their business (p. 70); that one advantage is you save on delivery by knowing whom you are going to supply (p. 75); that the man of small capital cannot afford to put in a filling station (p. 75); that his company is a small concern and their experience showed it was very difficult to get business from retailers who owned their equipment and who had been buying a satisfactory gasoline for years from the same person, and that by loaning pumps they were able to build up a trade (pp. 91-92).

Thomas K. Brushart (Record, Vol. III, p. 112) testifies that the little fellows would suffer if the loaning system was discontinued; that it would tend to drive the business to the service stations, which can only be established by the large companies; and (p. 113) that the curb pump is the utility for the little fellow and the filling station is the utility for the big fellow in the business.

J. M. Stoodt (Record, Vol. III, p. 214) testifies to the same fact, that an order preventing the loaning practice would injure the smaller companies more than the larger ones.

No testimony is adduced to show that Respondent did not obtain its tanks, etc., in a lawful manner; that any competing oil company is unable to obtain pumps or are compelled to pay exorbitant prices therefor by reason of respondent's practice; that respondent held a monopoly of tanks, etc., or any part thereof, and by reason thereof attained a monopoly of either the pump trade or gasoline business, or that it was the purpose, intent or ability to acquire one; that competitors had a reasonable ground for complaint; that respondent was doing anything else than use its lawfully acquired property in the usual course without deception, misrepresentation or oppression, and openly. Neither the oil companies have been injured nor the pump manufacturers. The entire complaint seems to come from pump salesmen, many of whom say they lost customers through

the oil companies furnishing pumps free, but it must be admitted that the loaned pump must of necessity have been purchased from a pump company and pump salesmen say that they got a commission on every pump that was sold in their territory.

The entire charge seems to be that respondent through lawfully acquired property has attempted through a lawful business method to draw to itself to the exclusion of others, and thereby monopolize a part of the trade. Every seller of goods attempts to gain as many customers as he can. So long as his methods are lawful the court will uphold him in his attempt. If such attempts are meant to be prohibited by the law then the purpose attempted to be secured by Congress, that is free and open competitive business will be defeated.

See

U. S. v. *Standard Oil Co.*, 173 Fed. 177, 191.
Whitewell v. *Continental Tobacco Co.*, 125 Fed. 454, 459.

If real competition is to continue the right of the individual to exercise reasonable discretion in respect to his own business must be preserved. *U. S.* v. *Colgate*, 250 U. S. 300; *U. S.* v. *Schraders Sons, Inc.*, March, 1920, U. S.

The engaging of many persons and corporations in the same line of business naturally makes for competition, and so long as competitors use business methods which are not unethical and without deception, misrepresentation or oppression, and thereby are able to secure a larger proportion of the public trade than another, clearly such competitors have a right to exercise reasonable discretion in respect to those business methods if real competition is to continue. It is quite conceivable that concerns capable of furnishing the public with gasoline at attractive prices, may be barred from the market to a very considerable extent from lack of sufficient

capital to enable them to install for the customers they secure a complete tank outfit on the same basis offered by respondent. If it be a fact that the use of the tank system is a normal development of gasoline distribution (Record, Vol. II, pp. 510, 520, 521, 498, 458, 598; Vol. III, pp. 83-86, 106, 108, 279-281) and exists because it is the most effective method known, it seems clear that this is a difficulty inherent to the business, which must be considered and met by those entering it, as is the case in other industries requiring large initial investments of capital.

Judge Jackson in *In Re Greene*, 52 Fed. 104, said:

> "Where the restraint is partial, either as to time or place, its validity is to be determined by its reasonableness and the existence of a consideration to support it. The question of its reasonableness depends on the consideration whether it is more injurious to the public than is required to afford a fair protection to the party in whose favor it is secured."

See also

Anderson vs. *U. S.*, 171 U. S. 604.
U. S. vs. *Addyston*, 285 Fed. 271.

The petitioner takes the position that in view of the decisions of this Court on April 10, 1922, in the case of the *Standard Fashion Company* vs. *Magrane-Houston Co.* and case of the *United Shoe Machinery Corporation*, also decided by this Court on April 17, 1922, the question of the leasing and loaning agreement being one which is violative of the law, has been fixed and determined by those cases. However the Court below in considering the leasing and loaning agreement of the Respondent has very clearly distinguished the present case from those two decided in April, 1922.

It is submitted, therefore, that on the face of the record there has been no such lessening of competition or creation of a monopoly as would bring the practice within the purview of the Clayton Anti-Trust Act.

V.

The order "to cease and desist" is at variance with the allegations of the Complaint and the Report and Findings.

(a) *Complaint.*

It has been pointed out in the argument of Point One, just what the counts of the complaint contained in the way of allegations against respondent and respondent therefore will go on to the next question, which will be in respect to

(b) *The Report, Findings and Conclusions.*

That part of paragraph 3 which reads "That petitioner, in leasing such device as aforesaid, during said period, has made and does now make, contract or leases with the said retailers in and by the terms of which the said retailer agrees to use the said device for containing, storing and vending the products of the petitioner, exclusively", is justified by the evidence; that part which reads "That the rental or lease charge provided for in such contracts is a nominal sum and that no other consideration for the leasing of such equipment by petitioner is provided for in said contracts", is not justified by the evidence for it is shown that by reason of the sign, the trademark or good will value to the respondents and vendor can be preserved and increased and the general public assured of good and proven quality; that less idle and unproductive capital is required by this method than by expensive service stations to furnish adequate service to the general public; that it is now the general custom of the trade, in which nearly all distributors are engaged and have invested much capital, to serve the public generally; that it has an advertising value to the respondent

which is of value to the public in directing its attention to the places where known quality can be had, and protects it from deceit by unscrupulous and unfair dealers.

And that part which says "that such devices are leased at nominal rentals as aforesaid, to promote and advance petitioner's petroleum and gasoline business", is true, but is this a violation of the law and can it be considered as an unfair method of competition?

Respondent has the right to put forth every legitimate effort to increase its sales, attempt to draw to itself, to the exclusion of others, as many customers and consumers as is possible.

Then again the finding "that such nominal prices or rental do not afford a reasonable profit to petitioner on the amount invested in such device" is not warranted by the evidence. Reasons why this is not true has been given in the foregoing.

Paragraph Four is true, but it is again urged that the method is not unfair.

Paragraph Five is also true, but there is nothing in respondent's leases which restrains competitors from leasing a pump, etc., to such small retailer.

Paragraph Six is partly true, but there is nothing in the evidence that warrants the finding that the leasing is done for the purpose "of preventing its competitors from obtaining as customers, the retail dealers with whom it (respondent) has entered into such contracts or leases as aforesaid".

As to Paragraph Seven. Competitors are at liberty to lease outfits if they so desire. The practice is a legitimate one for the reasons already urged, and if such competitors do not adopt such practice, and lose prospective customers, that is the natural result of their failure to meet lawful competition. As was said in the *Colgate* case, "If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved.

(c) *The Order.*

The order directs the respondent to refrain from *leasing said pumps on a nominal consideration and upon condition that such pumps are not to be used to store or handle its own products.*

The complaint charged unfair competition and "tying contracts" as defined by the acts; the findings as to unfair competition are not warranted by the evidence and as to "tying contracts" they fail to find the facts necessary to support the charge as laid in the complaint, notwithstanding which the respondent is served with an order to "cease and desist" from doing something not charged in the complaint and not found in the findings.

VI.

The order to "cease and desist" is in other respects illegal.

The evidence shows that respondent has invested upwards of One million of dollars ($1,000,000) in tanks with pump equipments, which have been leased or loaned to retailers under agreements made in good faith. It is respondent's contention that the petitioner has failed to prove that the agreements attacked are unlawful and to permit the carrying out of petitioner's order would simply mean the confiscation of the greater portion of respondent's investment and cause great loss in value (Record, p.).

The order is of such a sweeping character that it would deprive respondent of one of its most valuable assets; viz: the advertising and marketing of its gasoline under trademarks and trade names. If the court should prohibit respondent from the continuation of its trade

practice, surely such prohibition cannot be extended to include a practice of the wholesaler of leasing or loaning a sign or globe with a trade name or mark thereon to a retailer owning his own equipment, and to be kept on such equipment to give notice to the public as to what oil company's product is being worked through said pump.

Then again such order prohibits the respondent from adopting such methods as will have the same unlawful effect as the practice of leasing and loaning for nominal consideration. Nearly all, if not all, of the witnesses admit that if the oil companies make the retailers their agents such arrangment will be just the same as the leasing or loaning practice. It is contended that such agencies would be legal and the petitioner is unwarranted in embracing such agencies in their order.

VII.

Conclusions.

Citing an extract of the Court's opinion, with particular reference to a retailer, the Court says:

> "He is restricted in the use of the leased outfit to the storage and delivery of gasoline purchased from the lessor, but he is not limited to the use of one outfit, nor is he hampered in the sale of gasoline and other products of other manufacturers. The contract leaves every competitor free to persuade the retailer to install an additional outfit or to replace the outfit already installed by one of its own. While the effect of the restrictive clause of the contract in these cases may make competition somewhat more difficult because of the inclination of the satisfied retailer to stand by his wholesaler until another comes along and offers him something better, we are of opinion that the clause does not thereby lessen

competition between wholesalers to the extent contemplated by the statute and that a tendency to monopolize the wholesale trade has not been disclosed."

It is felt that the testimony and facts which have been brought out heretofore in this point warrant the finding of the Court below. In the brief of the petitioner filed in support of its petition for writ of certiorari to the United States Court of Appeals, Third Circuit, on page 12, petitioner states

"Retailers of gasoline are of three classes, the garageowner, the proprietor of the ordinary 'curb pump and tank', and the marketing companies by direct distribution through their own 'service stations' and otherwise. The present cases relate not at all to the last-named class, but rather to the restrictive leases of equipment to the proprietors of the curb stations and to a much lesser degree to restrictive leases to the garage proprietor class. The great majority of gasoline retail supply points are curb stations."

Then again on page 14 of the Petition, petitioner states:

"It is beyond question, we submit, that where there is but one outfit on each retailer's premises, and where that one equipment is restricted to the gasoline of the leasing company, the practical effect is the monopolization of the retailer by the marketing company."

"While the evidence shows that two only of the twelve marketing companies comprised within the so-called Standard Oil Group have out nearly 13,500 leases to curb pump dealers, the Trade Commission has wholly failed to grasp the fact that the majority, if not all, of said 13,500 dealers were never before dealers until they were solicited and created such by the marketing companies. Marketing companies in order to increase their gallonage output and at the

same time give a greater convenience to the public, went out in the highways and byways of the country and talked with the corner grocery store, meat shop, clothing store, drug store and various other trades people who had never before been dispensers of gasoline, and who had never before been approached by anyone to become a gasoline dealer, and who in fact had never before thought about becoming one until they were approached by the marketing company, with the result that the marketing company so first approaching them succeeded in prevailing upon such trades people to install a curb pump upon their premises, which in effect thereby gave a greater field to the public to obtain its gasoline and at the same time brought trade in the principal line carried by such newly created dispenser of gasoline. How can it therefore be said that the marketing company monopolized a dealer when it in fact created one where there had not been one before. If one will motor along the streets and roads of this country and see how crowded they are with automobiles, he will soon learn the absolute necessity of the needs of the motorist and drivers of gasoline-driven vehicles being met by the plan adopted by the marketing companies and complained of by the Federal Trade Commission. Keen competition certainly has been created by the method and the result has inured to the benefit of the general public. It is considered that the competition thus created is lawful and that respondent has the legal right to advance itself before its competitors and to build up its own business enterprises and to use all lawful means to that end. Because respondent has the capital to carry out the method of marketing complained of, and one of its competitors may not have such capital, this is no reason why the respondent should be permitted only to measure its progress in building up its business to that quantum which its smaller competitor with less capital may be able to do."

Respondent contends that under no application of the law to the facts as brought out in this case, notwithstand-

ing petitioners attempt to so stretch its order, can the trade practice as used by it be considered as unfair competition. Respondent has come by its "Outfits" in a lawful and legal manner; has used its property without any fraud, deception or oppression on the public or competitors in business; has used it as one of its necessary equipment in properly and safely dispensing its product. Respondent submits that the public interests have not been injured, nor does the practice tend to injure the public; that the practice does not tend to lessen competition or create a monopoly, and that the contracts do not constitute "tying contracts" within the meaning of Sec. 3 of the Clayton Anti-Trust Act; that the evidence fails to support the charges as made in the complaint, and that the order to cease and desist was improvidently issued and should be vacated and declared null and void and of no binding force upon this respondent.

All of which is respectfully submitted.

CHESTER O. SWAIN,
JAMES H. HAYES,
Attorneys for Respondent.

Dated, New York, March 6, 1923.

APPENDIX.

No. I.

In *Boggs* vs. *Furniture Company*, 163 Iowa, 106, the Court said:

"Men have the right to engage in lawful competition, and, though the competition may have the effect of driving another out of business, if the competition is lawful, no action arises, though injury resulted from the competition. Where there is lawful competition for gain, for supremacy in business, for the legitimate control of business, even though the purpose and effect of the competition is to drive from business competitors, yet, if the competition is lawful and carried on in a lawful way, no action will lie. There is a difference between lawful competition and simulated competition carried on with the sole purpose and intent, not of profit and gain, but of maliciously injuring others engaged in that particular business. . . . Every man has the legal right to advance himself before his fellows and to build up his own business enterprises and to use all lawful means to that end, although in the path of his impetuous movements he leaves strewn the victims of his greater industry, energy, skill, prowess, or foresight. But the law will not permit him to wear the garb of honor only to destroy. The law will not permit him to masquerade in the guise of honest competition solely for the purpose of injuring his neighbor."

In *Tuttle* vs. *Buck*, 107 Minn. 145, the court said:

"When a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort."

In *Angle* vs. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 151 U. S. 1, the court defined this practice as unfair competition and said:

> "It has been repeatedly held that if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the one injured can maintain an action against the wrong-doer." (Cases cited.)

In *Sperry & Hutchinson* vs. *Pommer*, 199 Fed. 309 at 314, the court said:

> "Of course the right to compete in business does not justify 'unfair' competition in business or trade or misrepresentations which tend to induce one party to a legal contract to refuse to perform it to the damage of the other party, or the giving of any form of consideration as an inducement to violate a valid contract."

In *Wheeler-Stenzel Co.* vs. *American Window Glass Co.*, 202 Mass. 471, the court said:

> "It is manifest that to knowingly and maliciously induce another to break a contract with the plaintiff is not justified by fair trade competition."

In *American Law Book Co.* vs. *Edw. Thompson Co.*, 84 N. Y. Supp. 225, the court said:

> "Intentional false statements, made with a view to obstruct the plaintiff's business, and to divert it to the defendant, are charged, and the solicitation of the subscriber's breach of contract is but a more active step in the same scheme of unfair competition."

See *Citizens Heat, Light & Power Co.* vs. *Montgomery W. P. Co.*, 171 Fed. 553 at 560, where the distinction

between fair and unfair methods of competition is set forth at length by definition and example.

See also:

Bitterman vs. *L. & N. R. R. Co.*, 207 U. S. 205.

Lewis vs. *Bloede*, 202 Fed. 7.

Sperry & Hutchinson Co. vs. *Associated Merchants Stamp Co.*, 208 Fed. 205.

American Malting Co. vs. *Keitel*, 209 Fed. 351.

Wells & Richardson Co. vs. *Abraham, et al.*, 146 Fed. 190.

Attorney General vs. *National Cash Register*, 148 N. W. 420.

No. II.

In *Walker* vs. *Cronin*, 107 Mass. 555, the court said:

"Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss came as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it came from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing."

See also:

Tunstall, et al. vs. *Stearns Coal Co.*, 192 Fed. 808.

Peoples Tobacco Co. vs. *American Tobacco Co.*, 170 Fed. 396.

Employing Printers' Club vs. *Dr. Blosser Co.*, 122 Ga. 509.

No. III.

The courts have also included in the category of unfair methods of competition the disclosure, or the procurement of the disclosure, or betrayal of secret processes, formula, machinery, and other trade secrets, as where competitors induce the employees of rival concerns to enter their employment in order that they may profit by the confidential information thus acquired by such employees.

Union Switch & Signal Co. vs. *Sperry*, 169 Fed. 926.

Philadelphia Extracting Co. vs. *Keystone Extracting Co.*, 176 Fed. 830.

S. S. White Dental Mfg. Co. vs. *Mitchell*, 188 Fed. 1017.

Eastman Kodak Co. vs. *Reichenbach*, 79 Hun, 183.

No. IV.

In *American Malting Co.* vs. *Keitel*, 217 Fed. 672 at 674, the court said:

> "Where the words and writings of a defendant are not only slanderous or libelous, but are calculated to frighten, intimidate or coerce the customers or clients of the complainant into discontinuing business relations, equity may interfere by injunction."

In *Holmes* vs. *Clisby*, 118 Ga. 820, 824, the court said:

> "Such a publication, in our opinion, exceeded the bounds of legitimate competition. It is right and proper for tradesmen to puff their own goods to the disparagement of those of others, but they must not allow their zeal to betray them into an attack upon

the personal reputation of their competitors for honesty and integrity."

See also:

Pennsylvania Iron Works Co. vs. *Henry Voght Machinery Co.*, 96 S. W. 551.

In *Racine Paper Goods Co.* vs. *Dittgen*, 171 Fed. 631 at 633, the court said:

"Undoubtedly, one claiming that his patent is being infringed should take steps to advise the public of his rights as provided for by statute, provided, however, that if it is made to appear that under pressure of so doing he is pursuing a course which is calculated to unnecessarily injure another's business and with the plain intention of so doing, his conduct will be deemed malicious and he brings himself within the rule of law obtaining in cases of unfair competition in trade and subject to injunction."

See also the same case, 164 Fed. 85 at 89.

Emack vs. *Kane*, 34 Fed. 46.

Lewin vs. *Welsbach Light Co.*, 81 Fed. 904.

A. B. Farquhar Co. vs. *National Harrow Co.*, 102 Fed. 714.

Adriance, Platt & Co. vs. *National Harrow Co.*, 121 Fed. 827.

Electric Renovator Mfg. Co. vs. *Vacuum Cleaner Co.*, 189 Fed. 754.

United States vs. *Patterson*, 205 Fed. 292.

No V.

Jackson, et al. vs. *Stanfield*, 137 Ind. 592.

Klingels Pharmacy vs. *Sharp & Dohme*, 104 Md. 218.

Bailey vs. *Master Plumbers*, 103 Tenn. 99.

No. VI.

In *Evanson* vs. *Spaulding*, 150 Fed. at 522, the cou
said:

"But, while the appellees have no right to pr
tection against competition, they have the right
protection against wanton and malicious interfe
ences and annoyances. . . . Their sole purpo
appears to have been to interfere with and preve
sales by the appellees. This they accomplished
breaking in upon conversations, interrupting sale
and making false representations as to the natu
of the appellees' goods, and the manner in which the
treated the purchasers thereof and other offensi
acts. Their purpose was not to sell goods of the
own and thereby interfere with sales by the appelle
but it was, by pursuing a policy of molestation,
drive the appellees out of business and out of th
country. The right of competition furnishes no ju
tification for such acts." (Numerous cases cited.

See also same case, 149 Fed. 913.

Economist Furnace Co. vs. *Wrought Iron Ran*
Co., 86 Fed. 1010.

Attorney General vs. *National Cash Regist*
Co., 148 N. W. 420, 428.

No. VII.

See

United States vs. *Carter*, 217 U. S. 286.

City of Findley vs. *Pertz*, 66 Fed. 427.

Alger vs. *Keith*, 105 Fed. 105.

No. VIII.

In *Coats* vs. *Merrick Thread Company*, 149 U. S. 562
the Supreme Court of the United States addresses itsel
to the question of unfair competition in trade in the fol
lowing language:

"Rival manufacturers may lawfully compete fo
the patronage of the public in the quality and price o

their goods, in the beauty and tastefulness of their enclosing packages, in the extent of their advertising and in the employment of agents, but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals."

In *Sterling Remedy Co.* vs. *Eureka Chemical & Mfg. Co.*, 80 Fed. 105, the Circuit Court of Appeals succinctly states the law as follows:

"It is sufficient to say that both parties have the right to embark in this trade; each has the right to put forth every legitimate effort to increase its sales, even at the expense of its rival, so long as it refrains from representing itself as the rival concern, or from representing its goods as the goods of the rival concern."

In *Scriven* vs. *North*, 134 Fed. 366, the Circuit Court of Appeals says:

"In cases of unfair competition, which rest upon a somewhat broader principle than technical trade marks, actual fraud or misleading of the public, or conduct calculated to mislead it, must be shown by the proofs either of actual intention to do the wrongful act or of the adoption of means calculated to effect that result. . . . The general principle that no man has a right to pass off his goods as and for the goods of another is broader than the rules applicable to strict trade mark. In this country this principle is generally designated as 'unfair competition in business.'"

In *Proctor & Gamble* vs. *The Globe Refining Company*, 92 Fed. 357, the Circuit Court of Appeals of this Circuit has laid down the general principle of the law in the following language:

"Each case depends upon its own facts and circumstances, and must be decided upon the applica-

tion thereto of settled principles which have recei
no substantial modification in recent years. The c
dinal rule upon the subject is that no one shall,
limitation or any unfair device, induce the public
believe that the goods he offers for sale are the goo
of another and thereby appropriate to himself
value of the reputation which the other has acqui
for his own products or merchandise. *Canal Co.
Clark*, 13 Wall. 311; *Coats* vs. *Merrick Thread C*
149 U. S. 562. The substance of the rule is w
understood and it is unnecessary to make extens
citation of cases which have recognized it."

It has been declared to be unfair competition fo
competitor to adopt or simulate the labels or advertisi
literature of a manufacturer of a patented article a
thus practically adopt the literature, designs, *et cete*
of the injured party on its statements and prospecti.

See *Farmers' Handy Wagon Co.* vs. *Beaver S*
& Box Mfg. Co., 236 Fed. 731.

See also *Walter Baker & Co.* vs. *Gray*, 192 F
921.

Where, for illustration, one manufactures acetyle
gas for automobile illumination put up in metal co
tainers of peculiar construction, with an exchange syste
of empties, and a competitor puts out another gas f
similar use and purchases empty containers from patro
of the first party and puts out his gas in such empt
containers, to which is pasted a small paper label, t
court has declared the practice to be unfair competitio
because the public was manifestly deceived into believi
that the product purchased was that manufactured an
offered by the first party, whose rights were thus in
paired.

See

Prest-O-Light Co. vs. *Davis*, 209 Fed. 917, and
Search Light Gas Company vs. *Prest-O-Lig*
Co., 215 Fed. 692.

In *American Washboard Co.* vs. *Saginaw Mfg. Co.*, 103 Fed. 281, the court said:

"There are numerous cases in the reports upon the subject of unfair competition in trade. From the general principle runing through them all of it may be said that when one has established a trade or business in which he has used a particular device, symbol, or name so that it has become known in trade as a designation of such persons's goods, equity will protect him in the use thereof. Such person has a right to complain when another adopts this symbol or manner of marking his goods so as to mislead the public into purchasing the same as and for the goods of complainant. . . . In *Canal Co.* vs. *Clark*, 13 Wall. 322, 20 L. Ed. 583, the court said:

"'It is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another.'

"Mr. Justice Field, in *Goodyear India-Rubber Glove Mfg. Co.* vs. *Goodyear Rubber Co.*, 128 U. S. 604, 9 Sup. Ct. 168, 32 L. Ed. 537, said:

"'The case at bar cannot be sustained as one to restrain unfair trade. Relief in such case is granted only where the defendant, by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff, thus palming off his goods for those of a different manufacturer, to the injury of the plaintiff.'

"See, also, *McLean* vs. *Fleming*, 96 U. S. 251, 24 L. Ed. 828, and *Chemical Co.* vs. *Meyer*, 139 U. S. 544, 11 Sup Ct. 627, 35 L. Ed. 249. In the latter case it was said:

"'The theory of a trade-mark proper being, then, untenable, this resolves itself into the question whether the defendants have, by means of simulating the name of plaintiff's preparation, putting up their own medicine in bottles or packages bearing a close resemblance to those of plaintiff, or by the use of misleading labels or colors, endeavored to palm off their goods as those of plaintiff.'"

In *Rathbone, Sard & Co.* vs. *Champion Steel Range Co.*, 189 Fed. 26, the Circuit Court of Appeals says:

> "The rule is well settled that nothing less than conduct tending to pass off one man's merchandise or business as that of another will constitute unfair competition."
>
> *Federal Trade Commission* vs. *Gratz*, 258 Fed. 314 at 316.

38 Cyc., page 576, says:

> "Unfair competition consists in passing off, or attempting to pass off, upon the public, the goods or business of one person as and for the goods and business of another. It consists essentially in the conduct of a trade or business in such a manner that there is either an express or implied representation to that effect and it may be stated broadly that any conduct, the natural and probable tendency and effect of which is to deceive the public so as to pass off the goods or business of one person as and for that of another, constitutes actionable unfair competition. The definition is comprehensive enough to reach every possible means of effecting the result."

Mr. Edward S. Rogers in his volume on "Good Will, Trade Marks, and Unfair Trading" discusses the law of unfair competition and at page 129 says:

> "So after several hundred years' development, the law of unfair competition has been crystallized into a single sentence—no one has any right to sell his goods as the goods of another."

Mr. Rogers then proceeds to enlarge upon this definition in the following language:

> "No one has a right to use any artifice or contrivance by means of which the sale of his goods as a rival's is accomplished either directly or indirectly, or will probably be accomplished by dealers who purchase from him. Will ultimate purchasers without active and actual passing off by either the producer or the retailer be likely to purchase the defendant's

goods in the belief that they are the goods of the complainant? It is of no consequence whether the deception is effected by imitation of trademark or name whether descriptive, geographical or personal, duplication of copying of device, label, color, design or get-up of enclosing package, duplication of catchwords, deceptive advertising, oral misrepresentation, silent passing off, or in any other way. Is one trader, directly or indirectly, expressly or by implication, making a false representation that his goods are those of a rival? It may be made in any of the myriad ways in which it is possible to convey impressions. The question in every case is: Is this false representation being made? And that question is a question of fact."

And again at page 137 we find this further definition nd application of the term "Unfair competition":

"It may now be considered established that after more than a century of struggle the law has put all cases of unfair competition, as that term is now understood, upon a common basis of fact. Is the defendant representing his goods as the goods of the complainant? If he is making this false representation by any means, however ingenious, the courts interfere and prevent the continuance of it by restricting or enjoining entirely the use of the efficient means by which it is carried out. Without attempting an exact classification or a comprehensive statement, because the contrivances of the infringer are as many and as various as the ingenuity of the dishonest schemer can invent, the common cases of unfair competition involve (1) the deceptive use of geographical names; (2) the deceptive use of personal names; (3) the deceptive use of descriptive names; (4)the imitation of the appearance and color of labels and the dress of packages; (5) the imitation of the form or peculiarities of packages or the configuration or visual appearance of the article itself; (6) the deceptive use of devices which, while having little physical resemblance, will cause goods to be known in the market by the same name; (7)

refilling distinctive genuine packages with spurious goods; (8) oral false statement and silent substitution; (9) deceptive advertising; (10) the false indication of geographical origin in a reputable district or locality, and the false assumption of membership in associations, unions and the like."

No. IX.

Consent decree entered in the case of *U. S.* vs. *F. S Bowser & Co., et al.*, Mch., 1920, U. S. The decree enjoins the defendants from doing any of the following charges in the complaint:

"(*a*) From making or causing to be made to customers or prospective customers of competitors, false representations concerning the standing, financial or otherwise, or the business methods of such competitors, with the purpose or intent to injure such competitors in their business; and from making any false representations concerning the quality of pumps tanks or outfits manufactured to meet the requirements of the National Board of Fire Underwriters.

(*b*) From bringing or threatening to bring suit against competitors, their customers or prospective customers, upon the claim, known to be false or not believed in good faith to be well founded, that the products of such competitors are an infringement of the patent rights of defendants.

(*c*) From hiring, bribing or employing architects, fire marshals, insurance representatives, or municipal officers or employees, to use their influence in promoting the sale of defendant's products, or in preventing the sale of the products of competitors.

(*d*) From procuring detectives, agents, or representatives to enter into or take employment in the factories, buildings, shops, or offices of competitors, without their consent, for the purpose of obtaining information concerning their business.

(*e*) From inducing or hiring draymen, railroad employees or other persons to obtain from shipments made by competitors, or from other sources, the

names and addresses of their customers; except that the traveling salesman of defendants, in making reports of prospective customers upon whom they have called, or employees engaged to make canvasses for the purpose of ascertaining the names and addresses of prospective customers, may report the name of the pump, tank or outfit owned by such prospective customer, if the purpose in so doing is not to injure in any manner the business of a competitor.

(*f*) From securing or attempting to secure, or bring about in any manner, the cancellation of orders taken or sales made by competitors, or interfering in any way with contracts entered into by competitors with purchasers of their pumps, tanks or outfits.

(*g*) From promising or agreeing to indemnify customers or prospective customers of competitors against losses from litigation or otherwise, on condition that they cancel their contracts with such competitors.

(*h*) From reducing the prices of pumps, tanks or outfits below the cost of production, or giving them away, in order to prevent sales by competitors; or discriminating in prices between different persons or localities with the purpose or intent thereby to destroy or injure the business of a competitor.

(*i*) From inducing or hiring salesmen, agents, or other employees of competitors to leave their employment, and enter the employment of defendants; but nothing in this section shall prevent defendants from hiring salesmen, agents, or other employees of competitors who shall have left, without any inducement from defendants, their employment and shall have applied to defendants for situations."

No. X.

In *Coca-Cola* v. *Butler*, 299 Fed. 224, the Court said:

"The well recognized rule of law is that the manufacturer of any article of food, drink or drug intended for consumption, or of any dangerous articles, may be liable to the ultimate purchaser and consumer

for negligence causing an injury, although there is no direct contractual relation between them, such an action resting on tort and not on contract." And cited these cases:

Waters-Pierce Oil Co. v. *Deselms*, 212 U. S. 159; 29 Sup. Ct. 270; 53 L. Ed. 453.

Standard Oil Co. v. *Murray*, 119 Fed. Rep. 572; 57 C. C. A. 1.

Huset v. *J. I. Case Threshing Machine Co.*, 120 Fed. Rep. 865; 57 C. C. A. 237, 240; 61 L. R. A. 303.

Riggs v. *Standard Oil Co.* (C. C.), 130 Fed. Rep. 199.

Keep v. *National Tube Co.* (C. C.), 154 Fed. Rep. 121.

Ketterer v. *Armour* (D. C.), 200 Fed. Rep. 322.

Mazetti v. *Armour*, 75 Wash. 622; 135 Pac. 633; 45 L. R. A. (N. S.) 213; Ann. Cas. 1915 C, 140.

Thomas v. *Winchester*, 6 N. Y. 397; 57 Am. Dec. 455.

Statler v. *Mfg. Co.*, 195 N. Y. 478; 88 N. E. 1063.

Wellington v. *Oil Co.*, 104 Mass. 64.

Roberts v. *Brewing Co.*, 211 Mass. 449; 98 N. E. 95.

Norton v. *Sewell*, 106 Mass. 143; 8 Am. Rep. 298.

Bishop v. *Weber*, 139 Mass. 411; 1 N. E. 154; 52 Am. Rep. 715.

Peters v. *Johnson*, 50 W. Va. 644; 41 S. E. 190; 57 L. R. A. 428; 88 Am. St. Rep. 909.

Peterson v. *Standard Oil Co.*, 55 Or. 511; 106 Pac. 337; Ann. Cas. 1912 A, 625.

Tomlinson v. *Armour & Co.*, 75 N. J. Law, 748; 70 Atl. 214; 19 L. R. A. (N. S.) 923

Dixon v *Bell*, 5 Maul. & Sel. 198.

No. XI.

MEMORANDUM OF AGREEMENT

AGREEMENT, made this day of , 191 , between the STANDARD OIL COMPANY (New Jersey), party of the first part, and of the of in the County of and State of New Jersey, party of the second part.

WHEREAS, the party of the second part is now purchasing Motor Gasoline from the party of the first part for sale to the consumers thereof and has requested the party of the first part to install an equipment on premises situate at in the of in the County of and State of New Jersey, for the better storage and handling of the Gasoline so purchased; and

WHEREAS, in compliance with said request and for the purpose so stated, the party of the first part is about to place upon the said premises of the party of the second part,

NOW THIS AGREEMENT WITNESSETH, that the said parties have agreed and do hereby agree as follows:

1. That the said equipment shall be used solely for the storage and handling of Motor Gasoline purchased by the party of the second part from the party of the first part for the purpose aforesaid.

2. That the party of the second part will at own cost and expense maintain said equipment in good condition and repair so long as shall continue to use the same.

3. That the party of the second part will not encumber or remove said equipment or do or suffer to be done anything whereby said equipment or any part thereof shall be seized, taken into execution, attached, destroyed or injured or by which the title of the party of the first part to the same may in any way be altered, disturbed or prejudiced.

4. That in case the party of the second part should at any time use the said equipment for any other purpose than the storage and handling of Motor Gasoline purchased from the party of the first part, or should cease for thirty (30) days to purchase Motor Gasoline from the party of the first part and sell the same in regular trade, the right or license of the party of the second part to use the said equipment shall terminate and the party of the first part shall thereupon have the right to enter upon the said premises and remove the said equipment and every part thereof.

5. That the party of the second part shall indemnify and save harmless the party of the first part, its successors and assigns, of and from any and all liability or claims for loss, damage or injury to persons or property (including, but not by way of limitation, the party of the second part, agents, servants, employes, and representatives or the property of any of them) caused or occasioned by any leakage, fire or explosion of Gasoline stored in said Tank or contained in or drawn through said Pump, or by or in the installation, maintenance, repair, or use of the said equipment, or any of the attachments or appliances used, connected, installed or furnished therewith, whether due to latent or patent imperfection or to any fault in installation, and whether the same arises from negligence or otherwise.

6. This Agreement shall terminate forthwith upon the sale or other disposition of the said premises by the party of the second part and may be terminated by either party hereto upon Five (5) days' notice in writing to the other party. Upon any such termination hereof the right or license of the party of the second part to use the said equipment shall terminate, and the party of the first part shall then and thereafter have the right to enter upon said premises and remove the said equipment and each and every part thereof.

IN WITNESS WHEREOF, the said parties have caused these presents to be duly executed the day and year first above written.

STANDARD OIL COMPANY (N. J.)

WITNESS:

By.....

Manager.

WITNESS:

.....

.....

The undersigned, being the owner of the above mentioned premises occupied by the party of the second part to the above Agreement, hereby consents to the placing of the equipment therein mentioned on such premises and agrees with the party of the first part that the title thereto shall remain in such party of the first part during the continuance of this Agreement or of any renewal thereof, and that it may remove said equipment from such premises whenever it desires so to do.

.....

WITNESS:

.....

No. XII.

[PUBLIC—No. 203—63D CONGRESS.]

[H. R. 15613.]

An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes.

* * * * * *

SEC. 5. That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, parntership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said

proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or isued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceding, including all the testimony record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commis-

sion as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon *certiorari* as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust acts.

Complaints, orders, and other processes of the commission under this section may be served by anyone duly authorized by the commission, either (*a*) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (*b*) by leaving a copy thereof at the principal office or place of business of such person, partnership, or corporation; or (*c*) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

* * * * * *

Approved, September 26, 1914.

No. XIII.

[PUBLIC—No. 212—63D CONGRESS.]

[H. R. 15657.]

An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes.

* * * * * *

SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

* * * * * *

Approved, October 15, 1914.

FILED
FEB 26 1923
WM. R. STANSBURY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1922.

No. 213.

FEDERAL TRADE COMMISSION,
Petitioner.

vs.

SINCLAIR REFINING COMPANY, a Corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT, SINCLAIR REFINING COMPANY.

EDW. H. CHANDLER,
Tulsa, Okla.
ROY T. OSBORN,
Chicago, Ill.
W. RAY ALLEN,
Chicago, Ill.
Solicitors for Respondent.

BARNARD & MILLER PRINT, CHICAGO.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1922.

No. 213.

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

SINCLAIR REFINING COMPANY, a Corporation,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT, SINCLAIR REFINING COMPANY.

STATEMENT OF CASE.

The respondent, Sinclair Refining Company, is a Maine corporation, with its principal business office in Chicago, Illinois. It is engaged in refining crude petroleum and in buying and selling crude petroleum and its refined products.

This cause places in issue respondent's methods in leasing and loaning oil pumps, storage tanks or containers, and their equipments to various persons, firms, copartnerships and corporations.

In this brief all citations to the record refer to the printed record in the Sinclair case.

The Federal Trade Commission issued its order quiring the respondent to cease and desist from its me ods of leasing and loaning the devices referred to.

On the petition of respondent the United States C cuit Court of Appeals for the Seventh Circuit review the order to cease and desist entered against respond by the Federal Trade Commission, and on considerati thereof entered its decree annulling and setting asi said order.

The cause is now before this Court by certiorari.

It is believed the following excerpts from and co ments upon the record will prove convenient to the Co in its consideration of this cause:

THE COMPLAINT.

July 18, 1919, the Federal Trade Commission issu its complaint (Sinclair Record, pp. 32-35, both inclusive charging that respondent, in interstate commerce, f more than four years last past has been engaged in th business of purchasing and selling refined oil and gas line (referred to as products), and the leasing and loa ing of oil pumps, storage tanks or containers and the equipments (referred to as devices), in competition wi numerous persons, firms, copartnerships and corpora tions similarly engaged, and in so doing—

COUNT I. In violation of the provisions of Section of the Act of Congress, approved September 26, 191 known as the Federal Trade Commission Act, (38 Sta at L. 717), has been using unfair methods of compet tion:

(a) With the effect of stifling and suppressing com petition in the sale of products and in the sal leasing or loaning of devices;

(b) With the effect of injuring competitors.

(c) In selling, leasing or loaning devices for prices or considerations which do not represent reasonable returns on the investments therein.

(d) In selling, leasing or loaning devices at prices below the cost of producing and vending the same.

(e) In providing in contracts covering the leasing or loaning of devices that the lessee or borrower shall not place in such devices or use in connection therewith products of a competitor of respondent.

(f) With the resultant loss of numerous customers and prospective customers by competitors of respondent.

COUNT II. In violation of the provisions of Section 3 of the Act of Congress approved October 15, 1914, known as the Clayton Anti-Trust Act, (38 Stat. at L. 730), has been using unfair methods of competition:

In leasing devices at a fixed price charged therefor on the condition, agreement or understanding that the lessees thereof shall not purchase or deal in the products of a competitor or competitors of respondent, with the effect to substantially lessen competition and tend to create a monopoly in the territories and localities where such contracts are operative.

THE ANSWER.

The answer of respondent to the complaint of the Commission contained (Sinclair Record, pp. 36-42, both inclusive):

AS TO COUNT I.

(a) A general denial.

(b) An admission of its corporate existence and that it is engaged in the business of purchasing and selling refined oil and gasoline, as well as the general refining of oils and the marketing of refinery products; that it is engaged in the

leasing and loaning of devices, and that the considerations received therefor do not in all instances represent reasonable returns upon the investment in such devices when the business of leasing or loaning such devices and the returns received thereon are considered separately and apart from the general business and sales policy of respondent.

(c) An averment that respondent has no knowledge of the cost to the manufacturer of producing and vending these devices.

(d) A specific denial that respondent's practice and custom of leasing and loaning devices have the effect of stifling and suppressing competition or of injuring competitors who sell said products and devices.

(e) An admission that respondent's form of contract with users of such devices provides in substance that the same shall be used by the lessees for the sole purpose of storing and handling products supplied by respondent, and setting forth a copy of the form of said contract (Sinclair Record, pp. 37 and 38).

(f) Specific denials that respondent has the knowledge, charged in the complaint, of the status and methods of certain dealers and certain of its competitors.

(g) Specific denial that respondent has knowledge that numerous, or any, competitors who are unable to enter into lease agreements or understandings have lost numerous, or any, customers in the sale of products because of the business practice of respondent, whether such competitors sell devices or products, or both.

As to Count II.

(a) A general denial.

(b) A specific denial that the prices charged the users of such devices are fixed on the condition, agreement or understanding that such users shall not purchase or deal in the products of

competitor or competitors of respondent; or that such prices have any relation to the use to which such devices shall be put; or that the effect of respondent's contracts is substantially to lessen competition or to create a monopoly.

(c) An averment that under respondent's contracts the users of its devices are at liberty to deal in any of the products of respondent's competitors.

The answer then set forth "Grounds of Defense" alleging in substance that the methods and practice of respondent were not originated by it; that the same are proper, and are necessary to meet competitive conditions; that they protect the respondent in marketing its products and its customers in receiving the same, and serve to identify respondent's products, which are manufactured by it by means of expensive processes and methods.

HEARING.

On September 26, 27 and 29, 1919, in its offices in Washington, D. C., testimony was heard simultaneously and in one proceeding before the Commission in support of the complaint against respondent and five other respondents; but the cases were not consolidated (Sinclair Record, pp. 44-134, both inclusive). Respondent offered no testimony, but entered into a written stipulation with the Commission covering certain features of the case (Sinclair Record, pp. 135-138, both inclusive).

COMMISSION'S REPORT, FINDINGS AND CONCLUSIONS.

October 14, 1919, the Commission issued its Repor Findings and Conclusions in substance as follows (Si clair Record, pp. 139-143, both inclusive):

1. That your respondent is a Maine corporation, no and since January 25, 1917, engaged in the business refining, purchasing and selling products as hereinbefor defined, and engaged in the leasing and loaning, but no in the manufacture, of devices as hereinbefore define in various states of the United States, but not in the Dis trict of Columbia, in competition with numerous othe persons, firms, corporations and copartnerships similarl engaged.

2. That in the conduct of its business as aforesaid purchases devices, and leases and loans the same to vari ous persons, firms, corporations and copartnerships, an in so doing said products and devices are handled an transported in interstate commerce by respondent and its competitors.

3. That in leasing and loaning said devices the con siderations received are less than the cost of purchasing and vending the same, when the business of leasing o loaning and the returns received therefrom are consid ered separate and apart from the general business and sales policy of respondent; and that the form of contract provides, in substance, that said devices shall be used for the sole purpose of storing and handling the products of respondent.

4. That a small proportion of such lessees handle sim ilar products of respondent's competitors and in so doing do not require or use more than a single pump outfit; that the practice of leasing such devices requires a large

capital investment; that many of respondent's competitors do not possess sufficient capital and are not able to purchase and lease devices as respondent does, partially by reason of which competitors have lost numerous customers to the respondent; and that the effect of the practice may be to substantially lessen competition and tend to create for respondent a monopoly in the business of selling petroleum products.

The Commission therefore concludes that the methods of competition and the business practices set forth in its findings are unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of the Federal Trade Commission Act and Section 3 of the Clayton Anti-Trust Act.

ORDER TO CEASE AND DESIST.

On October 14, 1919, the Commission followed its Report, Findings and Conclusions with an order directed to respondent to cease and desist, which is in substance as follows (Sinclair Record, pp. 143-145, both inclusive):

1. To cease and desist from directly or indirectly leasing pumps or tanks, or both, and their equipments for storing and handling petroleum products in the furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of the same after making due allowance for depreciation and other items usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom, and from doing any matter or thing which would have the same unlawful effect as that resulting from the practice prohibited.

2. To cease and desist from entering into contracts or agreements with dealers of respondent's petroleum products or from continuing to operate under any con-

tract or agreement already entered into conditioned that the devices leased to them thereunder shall be used only for storing or handling the products of respondent, and from doing anything having the same unlawful effect.

3. Provision is made that as to such devices as are now leased contrary to the order, the respondent shall have four months from the date of the order to enter into new contracts not incompatible with the spirit and intent of the order.

4. Under the provisions of paragraph (b) of Section 6 of the Federal Trade Commission Act the respondent is ordered within twenty days after the expiration of the four months' period above mentioned to make written report to the Commission of the plan or plans adopted for the lease, loan, gift or sale of devices and submit therewith forms of contracts proposed to be used.

BRIEF OF ARGUMENT.

INTRODUCTORY STATEMENT.

Preliminary to the argument in chief, a brief explanation of the nature and character of gasoline and kerosene, of the methods of storing and marketing the same, and of the equipment and devices used therein may be appropriate and prove helpful.

Gasoline is highly volatile and inflammable. Kerosene is inflammable and some dangers are connected with its storing and handling. Many of the states of the United States have imposed rigid inspection laws covering the manufacture, transportation and sale of both commodities; and practically all cities and towns have enacted strict provisions for the storing, handling and dispensing of the same.

When marketing of these products began they were transported and delivered in wood barrels in which the retailer inserted faucets with which to draw off the liquid into open measures, buckets or tin containers. This method of handling proved unsatisfactory for many reasons, among them being the attendant danger from fire, the deterioration of the commodity from its exposure to the atmosphere, and the consequent waste and spillage. These containers and appliances were furnished to the local dealer by the refiner or marketer.

Confronted on the one hand by statutory regulations and safeguards, and on the other by economic waste and loss, the marketer sought devices that would meet both situations. There came into use a form of metal tank of considerable capacity with hand pump, self measuring or

otherwise, for the storage and dispensing of kerosene. In practically all instances these are furnished by the local dealer. The adoption of gasoline as motive power for engines marked the beginning of its highest and fullest use thus far. It also made necessary the storing of this product in large quantities at points convenient to the public, and such storage and dispensing made it imperative that the same be safe, lawful and free from waste. Out of these conditions and necessities there developed the steel tank or container for the storage of gasoline, usually placed underground, and the selfmeasuring pump for dispensing the commodity through hose or metal pipes direct to the receptacle into which it is delivered. This equipment is practically air-tight and serves to prevent waste of the commodity and communication of fire thereto. The capacity of the tank employed depends usually on the extent of the business of the local dealer, ranging in size from 250 gallons to 1000 gallons, with 550 gallons as a fair average. The pumps used are either one-gallon or five-gallon capacity: that is, having a delivery capacity of one or five gallons at the time. The cost of a pump and tank, including installation, ranges from $150 to $500 with $300 as a fair average. It has become nearly a universal practice for refiners and marketers to lease and loan to local dealers such tanks and pumps for the storage and dispensing of gasoline. This practice, with its attendant conditions, is the basis of the Commission's complaint.

This storage and dispensing equipment, hereinbefore referred to as devices, is usually installed at the curbline or roadside for the convenient delivery of gasoline to the public, particularly to owners of automobiles and tractors. The installation may be in connection with a place of business or residence. Frequently the business house is a garage, but very often is a grocery store or

other business place having a convenient and desirable location.

It is the practice of refiners and marketers to establish at central points in territory to be supplied by them storage stations of sufficient capacity in which to store gasoline and kerosene in quantities adequate to supply such territory. From such storage stations deliveries are made by tank trucks, either motor driven or horse drawn, owned and maintained by the refiner or marketer. It is of course to the economic advantage of the marketer or refiner to make such deliveries in as large quantities and in as few trips as possible. It serves this purpose if the refiner or marketer has an established trade and thus knows with reasonable certainty the probable gallonage it will be called upon to supply. Usually the local dealer trades with that refiner or marketer whose commodity and service prove satisfactory to the trade of the dealer. A market and trade are established similar to those in other lines of merchandising.

From the foregoing it is apparent that one may have a convenient and desirable location for the installation of gasoline storage and dispensing devices; but on account of the required investment in equipment such one may hesitate to become a dealer in gasoline. Should a refiner or marketer lease or loan to the owner of such site devices at a nominal consideration, conditioned that products other than those of the lessor shall not be stored in or dispensed from such equipment, the lessor would thus have an additional station for the distribution of its products and a new competitive factor would be introduced into the general marketing field; the lessee would be established in a business enterprise, and there would be provided additional service and facilities for the handling and marketing of gasoline with safety and convenience to the public.

This method of storing and dispensing gasoline has resulted in marked increase in the number of tanks and pumps used. It has furnished the manufacturer of such devices a market not theretofore enjoyed by him. Your respondent is not engaged in the manufacture of such devices; but purchases the same in large quantities from manufacturers. It would seem, from the viewpoint of manufacturers of devices, that this wholesale market should be preferable to retail selling to widely scattered local dealers.

This method of storing and dispensing gasoline makes for the safety and great convenience of the public. In the territory under consideration there is hardly a community or a developed line of travel that is not supplied with a filling or service station at which gasoline may be obtained.

Your respondent attaches especial value and importance to its refining methods and processes, and to the quality of kerosene and gasoline produced thereby. These commodities it sells under trade marks and trade names, believing them to have superior qualities for the purposes for which they are manufactured. Stress is laid on these features in its advertising and sales campaigns. It believes that a large portion of the trade has found respondent's products satisfactory and prefers the same to others. It seeks to provide assurance that those calling for its products will receive the same. Obviously, trade marks and trade names cannot be attached to or placed on such products, but can be placed upon containers and pumps used in the sale thereof. Frequently this is done by means of a suitable sign, usually lighted by electricity, attached to the equipment. A further safeguard adopted by the respondent is to incorporate in its rental contracts covering devices a condition that the dealer shall not store therein or dispense therefrom any product other

than that of the respondent. This method reasonably assures the trade that the products it receives through devices so loaned and marked are the products of respondent. Such restrictive clause does not prevent the dealer from leasing devices or from purchasing and dispensing the products of refiners and marketers other than the respondent; but it does establish a safeguard against dispensing through the respondent's equipment products inferior to or other than those of the respondent.

Explosions and fires, with resultant damage to persons and property, frequently follow improper storage or handling of gasoline, or the use of inferior products. To lessen its liability from such disasters it behooves the refiner or marketer to provide safe devices for the proper handling of its products in the course of marketing them, and so far as may be to provide against inferior products being marketed from those devices. A means to these ends is respondent's practice of leasing to its customers proper tanks and pumps on the condition there shall not be stored therein or dispensed therefrom products other than those furnished by the lessor.

With many of the larger refining and marketing companies it is the practice to erect "drive-in" service or filling stations. The difference between this type of station and the one above referred to is that the drive-in station is designed and used exclusively for the marketing of gasoline and petroleum products, while the other type, generally referred to as a "curb" station, consists merely of a pump and tank operated in connection with some other business. The drive-in station is provided with a building used as the office of the attendant and for storing and displaying lubricating oils, greases and such other commodities as are on sale. The pump or pumps are so located in a drive-way, leading from and to the street, as to enable customers to drive in with their cars and get their supply of gasoline and drive out with

the least inconvenience. This type of station is som
what elaborate in design and of rather expensive c
struction and involves considerably more outlay th
does the curb station. The drive-in station is growi
in popularity with the public and, regardless of this it
of expense, is being installed by many of the larger
fining and marketing companies. This situation prese
a new and additional competitive factor which the smal
company is called upon to meet. Competition involvi
the leasing and loaning of devices is less onerous th
that wherein the drive-in station is involved.

REVIEW OF EVIDENCE.

Respondent respectfully submits that the Commissio
findings of fact and conclusions are not supported
the evidence, and that a review thereof will so disclo
The record in this respondent's case, coming from t
Seventh Circuit, stands alone so far as this respondent
concerned, and there is no agreement between counsel f
the petitioner and this respondent that the record
any similar case applies to this respondent's case.

Respondent has made the following review or digest
the evidence, (1) to substantiate its assertion that t
Commission's findings and conclusions are not support
by the evidence, and (2) if possible, to assist the Cou
in its inquiry whether the evidence supports the Co
mission's findings of fact, it having been held: "Ma
festly, the court must inquire whether the Commission
findings of fact are supported by the evidence. If so su
ported, they are conclusive."

Federal Trade Commission v. *Curtis Publishi*
Company, ... U. S. ...., decided January
1923.

Federal Trade Commission v. *Gratz*, 253 U. S
421, 424.

In considering the evidence offered on behalf of the Commission, the respondent is confronted with a situation out of the ordinary.

On September 26, 27 and 29, 1919, in its offices in Washington, D. C., testimony was heard simultaneously and in one proceeding by the Commission in support of the complaint against respondent and five other respondents. There were six separate and distinct cases; but they were not consolidated. It becomes difficult to determine what portions of the evidence apply only to the respondent, and what apply only to the respondents in the other five separate and distinct cases; and what portions of the evidence apply to all of the several respondents.

Before the Commission convened to hear these cases attorneys for respondent and for the Commission entered into a stipulation as to certain facts (Sinclair Record, pp. 135 to 138, both inclusive).

At the beginning of the hearing and before any testimony was heard, but after the Commission had convened, inquiry was made by Commissioner Colver and answered by Mr. Chester L. Zechiel, attorney-examiner for the Commission, as follows (Sinclair Record, p. 45):

> "Commissioner Colver: We understand that these cases are not consolidated except that they are being heard simultaneously; that each case is being considered separately and there is not in fact a consolidation.
>
> Mr. Zechiel: That is correct, sir, as I understand it."

Aside from the stipulation entered into between the Commission and respondent, the Commission introduced evidence only on the economic question so called. This is clearly disclosed by the record; and in reviewing the evidence of the witnesses who testified on behalf of the Commission, the respondent has assumed that it may

fairly rely upon the record that the evidence of such witnesses goes only to this one question:

> "The Acting Chairman: Here is the agreed statement of fact with the Sinclair Company, but you say it is not complete.
>
> Mr. Zechiel: The agreed statement is complete. It covers all the evidence except the economic question." (Sinclair Record, p. 77.)

There are further announcements appearing in the record that the economic question is the only one upon which the Commission produced its witnesses. These may be found Sinclair Record, pp. 45, 47 and 84.

With this situation in mind respondent has made three classifications of the Commission's evidence, aside from the stipulation, as follows:

(a) That which specifically refers to respondent.

(b) That which refers to a practice not indulged in by respondent.

(c) That which is general in its relation to the practice of respondent.

Thirteen witnesses were called on behalf of the Commission. Twelve of them represented oil companies; and one, Robert S. Colwell, is assistant general sales manager of S. F. Bowser Company, Fort Wayne, Indiana, engaged in the manufacture and sale of oil pumps and tanks. The home offices or headquarters of the oil companies represented by the government's witnesses are located in eight states as follows: Illinois, Ohio, Iowa, Wisconsin, Minnesota, Missouri, Kansas and Oklahoma. Charles L. Smith and W. E. Williams, two of such witnesses, are connected respectively with C. L. Smith Company and Iowa Oil Company, respondents other than your respondent. The commercial activities of the several respondents cover 37 states as follows: Alabama, Arkansas, Colorado, Connecticut, Deleware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Mary-

land, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, Wisconsin.

The evidence, (aside from the stipulation) on behalf of the Commission, which specifically refers to respondent.

Only seven of the Commission's witnesses testified directly about respondent. The testimony of four of them (W. L. Zust, W. E. MacEwen, H. F. Bagby and L. B. Hancock) in this respect is merely that respondent is one of their competitors; while that of a fifth witness, H. E. Wormhoudt, is merely to the effect that his company does not have respondent as one of its competitors. A sixth witness, Robert S. Colwell, testifies in relation to respondent that his company had manufactured for and sold to respondent certain pumps, the style and design of which the witness describes. The remaining witness, Joseph F. Kunz, states that respondent is a competitor of his company, and in one instance respondent furnished a customer a pump and sold the customer gasoline on a commission basis of one cent a gallon. The witness does not pretend to testify as to the nature or conditions of the contract between respondent and such customer with relation to the pump in question.

The following is an abstract of the testimony of the seven witnesses referred to:

W. L. Zust, whose testimony appears Sinclair Record, pp. 57 to 63, both inclusive, testified that he is manager of the Interstate Oil Company at La Crosse, Wisconsin. This witness testified as follows with relation to respondent:

"Q. (By Mr. Zechiel, Attorney for the Commission): Does the Sinclair Company sell in your community?

A. They do part of it. They have a station at Minneapolis and we come in competition with them up close to Minneapolis." (Sinclair Record, p. 58.)

H. E. WORMHOUDT, whose testimony appears Sinclair Record pp. 63 to 70, both inclusive, testified that he is Manager of the Manhattan Oil Company at Des Moines, Iowa. The witness testified with relation to respondent as follows:

"Q. (By Mr. Zechiel, Attorney for the Commission): Is the Sinclair Oil Company in your territory?

A. Not directly. We do not have the Sinclair at any of our stations, although they are generally in the State of Iowa." (Sinclair Record p. 67.)

W. E. MACEWEN, whose testimony appears Sinclair Record pp. 70 to 77, both inclusive, testified that he is Secretary and General Manager of the Nash (National) Refining Company at Cleveland, Ohio. This witness testified as follows with relation to respondent:

"Q. (By Mr. Zechiel, Attorney for the Commission): Who are your competitiors in your various territories?

A. Well, it really includes all the leading refiners and shippers of that particular product.

Q. And in connection with that, the Sinclair Refining Company?

A. Yes, sir." (Sinclair Record p. 71.)

"Q. (By Acting Chairman): What is the competition in Kentucky?

A. The Standard Oil Company of Kentucky is our principal competitor in Kentucky. Then there are a great many jobbers that operate out of Louisville—the Stoll Oil Company, and I do not know whether the Sinclair is in Kentucky or not." (Sinclair Record p. 71.)

JOSEPH F. KUNZ, whose testimony appears Sinclair Record pp. 78 to 83, both inclusive, testified that he is

Secretary of Kunz Oil Company, Minneapolis, Minnesota. This witness testified with relation to respondent as follows:

"Q. (By Mr. Zechiel, Attorney for the Commission): Do you know the names of any of the competing oil companies?

A. In our city the Sinclair and the Standard.

Q. (By Commissioner Thompson): Of Indiana?

A. Of Indiana; yes sir.

Q. (By the Acting Chairman): Your city is what?

A. Minneapolis." (Sinclair Record, p. 79.)

In response to questions as to whether witness' company had ever lost any customers by failure to furnish them devices, the witness answered that in some instances it had lost gasoline customers but continued to sell some of these customers lubricating oils. The witness was then asked to describe some such instances and did so; and his testimony then proceeded as follows:

"Q. (By Mr. Zechiel, Attorney for the Commission): What other instances of that sort have you in mind?

A. There is one of the 13th Avenue Hardware Company. They put in a pump of the Sinclair Company in the same way.

Q. What were the facts about that?

A. They wanted us to put in a pump and we would not do it, and the Sinclair Company put in a pump in their place and sell them gasoline under one cent a gallon commission, one cent a gallon profit.

Q. Are there any other instances that you recall?

A. No, I do not.

Q. That is the Sinclair Refining Company to which you refer?

A. Yes, sir, the Sinclair Refining Company." (Sinclair Record, p. 81.)

Robt. S. Colwell, whose testimony appears Sinclair Record, pp. 94 to 98, both inclusive, testified that he is assistant general sales manager of S. F. Bowser Com-

pany, of Fort Wayne, Indiana, engaged in the manufac ture and sale of oil pumps and tanks. This witness tes tified with relation to respondent as follows:

"Q. (By the Acting Chairman): I would like t ask this question as a trade matter:

In manufacturing pumps do you manufacture them always for Bowser, or will you manufacture for other sellers of gasoline if they desire? Suppose the Sin clair Oil Company came to you and wanted pumps Would you manufacture them for the Sinclair O Company?

A. Our business, you know, is only the equipmen We do not sell any gasoline or oil.

Q. I know that is true.

A. But we do business with the Sinclair people.

Q. And do manufacture for them?

A. Only under our own name.

Q. That is what I wanted to know.

A. No; we never manufacture with any label b the Bowser label.

Q. You manufacture a pump for the Sinclair Com pany as a Bowser pump but carrying above the pum this Sinclair sign?

A. We have done that. We do that right along- finish it in what we call, in that case, the Sinclai finish.

Q. You are just interested in the sale of pumps?

A. Yes, sir.

Q. (By Mr. Zechiel, Attorney for the Commis sion): When you say you finish it in the Sinclai finish, just exactly what does that mean?

A. That means, in their case, a green pump with white top, and some—

Q. That portion above the ground?

A. Yes, sir. The pedestal would be green—I think that is their trade mark color—and the top part is white, which is another one of their colors, and gol striping, and then the Sinclair trade mark name o there.

Q. (By the Acting Chairman): On the lamp? I think I have seen that.

A. I do not think the Sinclair people use a lamp Some of the other companies do." (Sinclair Rec ord, pp. 97-98.)

H. F. Bagby, whose testimony appears Sinclair Record, pp. 108 to 113, both inclusive, testified that he is connected with the White Eagle Oil Refining Company, of Wichita, Kansas. This witness testified with relation to respondent as follows:

"Q. (By Mr. Zechiel, Attorney for the Commission): Who are your competitors in that territory (States of Kansas and Colorado)?

A. Standard Oil Company of Indiana, mostly.

Q. Does the Sinclair Company sell there?

A. They are a competitor, too.

* * * * *

Q. What are the other competitors besides the Standard?

A. The Sinclair is the next largest, and then there are several small companies." (Sinclair Record, p. 109.)

L. B. Hancock, whose testimony appears Sinclair Record, pp. 120 to 125, both inclusive, testified that he is manager of the Pure Oil Company, Minneapolis, Minnesota. This witness testified with relation to respondent as follows:

"Q. Is the Sinclair Company one of your competitors?

A. Yes, sir." (Sinclair Record, p. 121.)

The evidence, (aside from the stipulation) on behalf of the Commission, which relates to a practice not indulged in by respondent.

In its complaint the Commission charges the respondent with leasing or loaning devices on the condition, agreement or understanding that the lessees thereof shall not purchase or deal in the products of a competitor or competitors of respondent (Sinclair Record, p. 35); but the Commission found and the evidence discloses that the condition incorporated by respondent in such contracts is that such devices shall be used by the lessee only for the

purpose of holding and storing the respondent's petro-
lem products. (Sinclair Record, pp. 136 and 142.) The
condition charged and the condition proven and found are
vastly different: the former prohibits the lessee from
dealing in, buying or selling the products of a competitor
of the lessor; while the latter merely restricts the lessee
in the commodity stored in and dispensed through the
lessor's devices, and in no way restricts the lessee in buy-
ing and selling the products of a competitor of the lessor.
Respondent assumes therefore that if a witness for the
Commission testified as to a practice or form of contract
based on the condition that the lessee thereunder shall
not purchase or deal in the products of a competitor or
competitors of the lessor, the witness would be testifying
to a condition and state of facts not applicable to respond-
ent; and that therefore the testimony of such witness
and his deductions and conclusions therefrom as to the
effect of the practice should be disregarded so far as the
respondent is concerned.

The six Commission witnesses whose testimony is of
this character are Charles L. Smith, W. L. Zust, H. F.
Wormhoudt, W. E. MacEwen, O. L. Cordell and W. F.
Williams, of whose testimony respondent has made the
following abstract:

CHARLES L. SMITH, whose testimony appears in Sin-
clair Record, pp. 48 to 57, both inclusive:

"Q. Does the contract provide that the companies
or the customers to whom you may loan or lease
these pumps and tanks are not to use any gasoline
of any other competitor at all?

A. Absolutely." (Sinclair Record, p. 50.)

"Q. But you have made contracts with these var-
ious garages?

A. Oh, yes, sir, the same as we make on lubricat-
ing oil, to protect them a certain period of time."

"Q. Do I understand that by the terms of these
contracts they are not permitted to buy such prod-

ucts as are included in the terms of the contracts from competitors of yours?

A. Absolutely so." (Sinclair Record, p. 54.)

W. L. Zust, whose testimony appears in Sinclair Record, pp. 57 to 63, both inclusive:

"Q. Do you lease or loan oil tanks and pumps under contracts whereby you require your lessee to use only your own products and pay only a nominal consideration for the pumps and tanks?

A. No, sir." (Sinclair Record, p. 59.)

"Q. Describe your experience in this respect.

A. A year ago or some such a matter the Standard Oil Company of Indiana allowed their customers to have these tanks. They were leased or given away; I do not know just exactly what the arrangement was.

Q. You say you don't know what the arrangement was? You do know that they leased these pumps for a nominal consideration?

A. I don't know whether they got anything or not. I doubt whether they got anything." (Sinclair Record, p. 59.)

H. E. Wormhoudt, whose testimony appears in Sinclair Record, pp. 63 to 70, both inclusive:

"Q. What was the effect of the agreement?

A. That we would furnish without charge this pump, and that so long as the pump was used our goods should be used, should be purchased by this man to whom we had loaned the pump. But I might say that we were jockeyed into that proposition. We did not do that willfully.

Q. What do you mean by that?

A. I mean that competitors had made an offer to do that or to take from us that customer's business." (Sinclair Record, p. 65.)

W. E. MacEwen, whose testimony appears in Sinclair Record, pp. 70 to 77, both inclusive:

"Q. Does it ever occur to you that the situation now differs materially from the old times when trade was small, units were small? In your boyhood

it was quite common for a merchant to give something 'to boot'? It was in the shape of a gratuity. Giving a pump is something more as I see it from what I have heard today, than giving something 'to boot,' is it not?

A. Yes, sir; because you surround that with an ironclad agreement to compel that customer to buy your goods during the time he has that pump in there, whether the quality of the gas deteriorates or not. He is under that obligation to use your goods exclusively. You immediately affect the entire petroleum industry under that kind of contract." (Sinclair Record, p. 73.)

"Q. Can you add anything to what has been said here today about the fact that the sale of the gasoline with the gift of the pump or the lease of the pump at a nominal figure is used as a device for the sale of lubricating oil?

A. I think that is true to a considerable extent. The object in giving the pump is to find a market for the gasoline, a method by which to distribute the gasoline. Of course, the contract carries with it a clause that they shall use all of their petroleum products in return for giving that pump and tank. I do not believe you can give a pump and tank and make any money out of gasoline." (Sinclair Record, p. 74.)

O. L. Cordell, whose testimony appears in Sinclair Record, pp. 85-94, both inclusive:

"Q. What was the consideration, if any, that was given for the use of these tanks and their equipment?

A. None whatever. The business——

Q. Nothing but the agreement to use in connection with these particular pumps and tanks your own gasoline products?

A. Yes, sir.

Q. In that connection did you also require the customers to purchase lubricating oils through your company?

A. That was not a consideration. However, it was generally understood that we should have their lubricating oil business.

Q. Was it understood between you and your customer that they were to buy all of their gasoline from your company?

A. It was." (Sinclair Record, p. 88.)

W. E. WILLIAMS, whose testimony appears in Sinclair Record, pp. 113 to 120, both inclusive:

This witness testified that his company had changed its form of contract and inserted therein a clause to the effect that the lessee might have the privilege of installing devices of like nature of another oil company for the purpose of handling such other company's oils if so desired. Directing the witness's testimony to the former contract used by his company and in answer to an inquiry, he stated as follows:

"A. Yes, sir. The original agreement stated that we were to have the exclusive sale of the gasoline during the life of the contract." (Sinclair Record, p. 116.)

The testimony of this witness is based entirely on a condition brought about by contracts of the nature described in the above portion of his testimony.

The evidence, (aside from the stipulation) on behalf of the Commission, which may be regarded as having general application to the practice charged against respondent.

If the testimony of the six witnesses last above mentioned is eliminated from consideration in respondent's case, there would remain seven witnesses on behalf of the Commission.

We now proceed to a review of the evidence of those witnesses on behalf of the Commission whose testimony may be regarded as applicable to a practice or plan of leasing or loaning devices in the manner and on the condi-

tions devices are leased or loaned by respondent. This evidence is general in its application, and almost without exception does not specifically relate to the respondent's case. In considering this evidence it may be advisable to again state that respondent's leasing or loaning contracts are conditioned that the devices covered thereby shall be used by the lessees only for the purpose of holding and storing the respondent's petroleum products, and do not restrict the lessee from dealing in or selling products of competitors of respondent.

Of the remaining seven witnesses ROBERT S. COLWELL (Sinclair Record, pp. 94 to 98, both inclusive) is assistant sales manager for S. F. Bowser Company, engaged in the manufacture and sale of oil pumps and tanks (Sinclair Record, p. 94); and his testimony goes only to the question of the jurisdiction of the Commission as shown by the record:

> "The Acting Chairman: What do you expect to show by this witness?
>
> Mr. Zechiel: Jurisdiction only, Mr. Murdock.
>
> The Acting Chairman: He does not know anything about the economic situation at all.
>
> Mr. Zechiel: And nobody from Bowser's headquarters knows. The only way I could get that evidence would be to call one hundred twenty-four agents. I would have to call those agents particularly to get that evidence. I think we have probably got it through the oil company witnesses." (Sinclair Record, p. 97.)

The following is an abstract of the testimony of the Commission's six remaining witnesses in its relation to a contract apparently containing the condition incorporated in respondent's contract:

JOSEPH F. KUNZ, a Commission witness, whose testimony appears Sinclair Record, pp. 78 to 84, both inclusive, testifies in substance as follows:

His company does not deal in pumps and tanks, but is engaged principally in the sale of lubricating oils, although it handles gasoline and kerosene, which it sells to truck owners. It has no filling stations. It is his belief that his company is not selling gasoline to garage people for the reason that it declines to lease or loan devices to garages, at least it is his opinion that has considerable to do with it. (Sinclair Record, pp. 78 to 79.)

When asked to explain the whole situation the witness in substance stated: We have lost one customer, The Peter Faber Co. We sold them. They asked us to furnish them a pump and tank, which of course we could not afford to do, and would not do, so they bought from some other company. I am not in position to say whether this other company put in a pump because I do not know. This is only what the customers tell us, that they agreed to put in a pump and tank. They have not bought any gasoline from us since the installation of the pump. We called on them, but they never bought any more from us since then. The customer felt on account of using their pump and tank it was not policy for him to buy his gasoline from us. We tried to and did sell him lubricants. He buys lubricating oil from us. In the case of the East Side Auto Company it was represented that other companies were going to furnish them oil and to furnish a tank. In order to keep the customer we had to pay for one-half of the tank and the pump. (Sinclair Record, pp. 80 to 81.)

The witness states that he does not know of an instance where this company was deprived of the sale of lubricating oils to a customer by reason of a competitor installing oil pumps; and that in his case it does not follow that because a dealer uses a loaned pump the dealer thereby ties himself up to buy his lubricating oil of the one who sells him the gasoline; that in a great many cases it does

not make any difference, as the dealer will probbly bu
the gasoline from the company loaning the pump and bu
lubricating oil from the witness' company. (Sinclair Re
ord, p. 82.)

"Q. (By Commissioner Thompson): You thi
it cuts down competition in gasoline?

A. By owning your own tank?

Q. No; by having a tank which simply is give
you for a nominal sum?

A. Yes, sir.

Q. (By the Acting Chairman): I wish you woul
explain why it cuts down competition?

A. For this reason, just as I explained before.
am not in position to sell a man gasoline if he comes
me and says, 'Here, I am buying my gasoline fro
you and have to furnish me a tank and a pump
We have not got the money to keep these tanks an
pumps, and it simply takes our business away fro
us; whereas, if that man buys his own outfit he com
come to me anyway and say, 'I want to buy som
gasoline from you,' and it would be all right. But
the other hand, we cannot sell them any gasoline.
do not mean to say we cannot sell them anything el

Q. Then, taking that answer that you have ju
made with the former answer a few minutes ago, th
device of the free pump in your opinion tends to r
duce the number of competitors to only the stronge
companies in the field, those who are enabled by re
son of their capital to give the pump. Is that tru

A. Yes, sir.

Q. So, while it reduces the number of competitor
can it be said that it actually reduces competition
more than one man is given the pumps?

A. Yes, sir." (Sinclair Record, p. 83.)

Seth C. Drake, a Commission witness, whose testimon
appears Sinclair Record, pp. 100 to 108, both inclusiv
testifies in substance as follows:

That in his experience numerous garages and retaile
use devices of more than one oil company and buy an
sell gasoline and oils of different companies at the sam
time. (Sinclair Record, p. 103.) But in most cases the

have only one pump, and that will be loaned by somebody, and of course there would not be anybody else's gas handled as a rule, but in many cases they do have two tanks and pumps and handle two different kinds of gasoline, and have the gasoline of more than one competitor go through the pump. Many garages buy gasoline of two or three different companies. They buy from us one week, of some other company next week, and another company the week after. In many cases they buy of us exclusively. We do not restrict them from putting in someone else's pump and tank. (Sinclair Record, p. 104.)

H. F. Bagby, a Commission witness, whose testimony appears Sinclair Record, pp. 108 to 113, both inclusive, gives the following testimony:

"Q. With what company are you connected?

A. White Eagle Oil Refining Company of Wichita.

Q. How long have you been connected with that company?

A. Ever since its organization, July, this year." (Sinclair Record, p. 108.)

"Q. Do you lease or loan oil tanks and pumps?

A. This company, since its organization in July, has not sold any tanks or pumps or leased any.

Q. Is it your intention not to continue this practice or to adopt this practice?" (Sinclair Record, p. 109.)

"A. Unless we are forced to it. We do not approve of the practice.

Q. Why do you not believe in the practice or approve of it?

A. It is not a profitable way of doing business, we do not think.

Q. Do you handle lubricating oils?

A. Yes, sir.

Q. In your experience in the past, would you say that there is more profit in the sale of lubricating oils than there is in the sale of gasoline?

A. Yes, sir." (Sinclair Record, p. 110.)

L. B. Hancock, a Commission witness, whose testimony appears Sinclair Record, pp. 120 to 125, both inclusive, gives the following testimony:

"Q. Does your company buy and sell or lease and loan oil tanks and pumps in connection with its business?

A. We buy and sell and lease a few.

Q. You say you lease a few. Do you mean you lease a few under tying contracts for a nominal consideration?

A. We have a few of that kind, four, to be exact." (Sinclair Record, p. 120.)

"Q. Have you ever refused to lease and loan pumps under these contracts for a nominal consideration, tying contracts, to customers who requested them?

A. Yes, we have." (Sinclair Record, p. 122.)

"Q. What was the result of your refusal to lease the pumps?

A. The party that will do it will get the business.

Q. You lost the business of that company?

A. Yes, sir.

Q. (By the Acting Chairman): What is your experience with the sale of lubricating oils in connection with gasoline in the way of margin of profit?

A. Oh, the margin of profit is considerably greater in the lubricating oils." (Sinclair Record, pp. 122 and 123.)

The witness was then asked whether during the last two years he felt there were too many pumps being put in and that the numbers used were multiplied beyond any reasonable needs of society, to which he replied there might be if the business remained constant, but with the ever increasing demand for gasoline there is not too much equipment for the distribution of it.

"Q. It is not necessary, therefore, to actually lease or loan a pump for a nominal consideration under a tying contract in order to designate whose gasoline is being sold from the pump?

A. I do not consider it so." (Sinclair Record, p. 124.)

J. M. Welch, a Commission witness, whose testimony appears Sinclair Record, pp. 125 to 132, both inclusive, testifies in substance as follows:

That his company does not lease or loan devices (Sinclair Record, p. 126); that it is the custom of the large dealers to have two or three sets of pumps and tanks loaned to them by as many different oil companies; that with small dealers such as grocery stores, blacksmith shops or little stores where the demand is limited, usually there is only one device installed; that the larger dealers will not tie themselves up exclusively with any oil company through the leasing or loaning of equipment, and if the demand is great enough such dealer would put in one or more pumps of several concerns all on the same basis; that under such circumstances the dealer would not store and dispense the commodity of one oil company through the equipment of another oil company. (Sinclair Record, p. 128.) The witness stated he considered it good merchandising for an oil company to loan a pump to a dealer at a nominal rental in consideration of the dealer selling the company's gasoline. (Sinclair Record, p. 129.)

The witness then stated in substance that he regarded the practice as good merchandising in the days it was in its bloom, in the days when it was universally followed; but that he now regards it as unprofitable on account of the filling stations. (Sinclair Record, p. 130.) Witness further stated that he does not regard the general practice as detrimental to the community. The practice made it safer to handle gasoline for the reason that the smaller dealers could not afford to buy equipment themselves and if some big oil company or companies would furnish the pump and make it safe to handle the gasoline that in the opinion of the witness the practice was a good thing. The average dealer in small towns and grocery stores and little garages could not furnish his own pump equip-

ment and make a profit in handling gasoline as the investment would be too great. (Sinclair Record, p. 130.) There were lots of pumps that were probably leased or given away to firms that could have afforded to buy them, but in a number of cases pumps were put in and gasoline handled by dealers who could not afford to buy the pump equipment outright. He also stated that his company had tried to sell gasoline to small dealers who had been furnished pumps and was unsuccessful in doing so, and that his company had lost some customers to marketers who furnished equipment or devices. (Sinclair Record, p. 131.)

H. C. Wurster, a Commission witness, whose testimony appears Sinclair Record, pp. 132 to 134, both inclusive, gives the following testimony:

"Q. Do you lease or loan such pumps to your customers?

A. No, sir.

Q. During the conduct of your business has your company ever lost any business because it refused to lease or loan pumps?" (Sinclair Record, pp. 132 to 133.)

"A. I would say we have.

Q. You refused to lease them or loan them?

A. Yes, sir.

Q. Did you lose such customers?

A. Yes. I would say not in all cases.

Q. In many cases?

A. In many cases; yes, sir.

Q. Do you believe it to be a good business practice to lease or loan pumps under a nominal consideration in tying contracts?

A. I do not think it is a good policy; no.

Q. (By the Acting Chairman): Why do you not consider it good merchandising?

A. The question comes up where you have to buy your business in that way, I do not think it is good salesmanship. It lets the bars down, and practically there is no limit as to how many pumps you put out. I might add to that that if there could any limit be

made as to garages doing a large volume of business in order to protect the independents or the smaller companies against filling stations, it would be all right; but it is hard to draw a line and consequently I think it is simply poor merchandising all the way through." (Sinclair Record, pp. 133 to 134.)

COMPETITION.

Many oil companies engaged in business and competition is keen and active.

The testimony of the Commission's witnesses discloses that in the territory in which the respondent and the companies of the witnesses transact business many oil companies are engaged in the sale of petroleum products and that competition is not only free but particularly active.

In this connection, respondent directs attention to the following testimony:

CHARLES L. SMITH, a witness for the Commission, whose testimony appears Sinclair Record, pp. 48 to 57, both inclusive, states he is President of the C. L. Smith Oil & Gasoline Company, with headquarters in St. Louis and transacting business in the State of Missouri, particularly in the City of St. Louis. The witness enumerates six companies as being in active competition with his company (Sinclair Record, pp. 48-49), and in that connection testified as follows:

"Q. (By Mr. Zechiel, attorney for the Commission): During the time you have had these contracts with these various customers, were these various oil companies whom you have enumerated earlier in your testimony actively in competition with you in the City of St. Louis?

A. With the exception of the Standard, they were, yes.

Q. You mean the Standard of what?

A. The Standard of Indiana." (Sinclair Record, p. 52.)

W. L. Zust, a witness for the Commission, whose testimony appears Sinclair Record, pp. 57 to 63, both inclusive, testifies that he is Manager of the Interstate Oil Company of La Crosse, Wisconsin, engaged in business in two-thirds of the State of Wisconsin and the southern border of Minnesota. This witness names seven companies as being in active competition with his company. (Sinclair Record, p. 58.)

H. E. Wormhoudt, a witness for the Commission, whose testimony appears Sinclair Record, pp. 63 to 70, both inclusive, testifies that he is Manager of the Manhattan Oil Company, of Des Moines, Iowa, engaged in business in the State of Iowa and the two northern tiers of counties of Missouri. This witness enumerates six companies as being in active competition with his company. (Sinclair Record, p. 67.)

W. E. MacEwen, a witness for the Commission, whose testimony appears Sinclair Record, pp. 70 to 77, both inclusive, testifies that he is Secretary and Manager of Nash (National) Refining Company. This witness states that his company operates in the States of Ohio, Indiana, Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, Nebraska, Kansas, Missouri, Oklahoma, Arkansas, Mississippi and Kentucky, and its competitors are all the leading refiners and shippers of petroleum products, naming specifically thirteen companies. (Sinclair Record, pp. 70 to 72.) The witness states that in the territory in which his company operates competition is keen. (Sinclair Record, p. 76.)

Joseph F. Kunz, a witness for the Commission, whose testimony appears Sinclair Record, pp. 78 to 84, both inclusive, testifies that he is secretary of Kunz Oil Company and that his company operates in Minnesota, North Dakota, South Dakota and part of Montana. (Sinclair

Record, p. 78.) The witness names two competitors of his company in the City of Minneapolis, Minnesota. (Sinclair Record, p. 79.) In relation to competitive conditions the witness stated in substance that his company "has stiff competition." (Sinclair Record, p. 82.)

O. L. Cordell, a witness for the Commission, whose testimony appears Sinclair Record, pp. 85 to 94, both inclusive, testifies that he is connected with the Sloan-Cordell Oil Company, of Oklahoma City, Oklahoma, and that his company operates in the State of Oklahoma but principally in Oklahoma City, Oklahoma. (Sinclair Record, p. 85.) The witness enumerates twelve companies as being in active competition with his company. (Sinclair Record, pp. 88-89.) In testifying about competitive conditions, the witness ventured the assertion that in Oklahoma City there are about three times as many service stations as were needed; that they are in all parts of the city; and that one does not have to drive very far in any part of the city to find a gasoline station operated by some oil or gasoline company there. (Sinclair Record, p. 93.)

Seth C. Drake, a witness for the Commission, whose testimony appears Sinclair Record, pp. 100 to 108, both inclusive, testifies that he is general manager of the sales department of the Standard Oil Company of Indiana, and that his company operates in the States of Indiana, Michigan, Illinois, Wisconsin, Iowa, Minnesota, North Dakota, South Dakota, Kansas and Missouri. (Sinclair Record, p. 101.) This witness testifies, in substance, that competition is particularly active in the territory of his company; that dealers in petroleum products buy from his company one week, of another company the next week, and another company the week after. (Sinclair Record, p. 104.)

H. F. Bagby, a witness for the Commission, whose testimony appears Sinclair Record, pp. 108 to 113, both inclusive, testifies that he is connected with White Eagle Oil Refining Company, of Wichita, Kansas, operating in Eastern Colorado and Western Kansas. (Sinclair Record, p. 108.) He names four competitors of his company but states there are several. (Sinclair Record, p. 109.) In substance this witness states that competition among the oil companies is active. (Sinclair Record, p. 112.)

L. B. Hancock, a witness for the Commission, whose testimony appears Sinclair Record, pp. 120 to 125, testifies he is manager of the Pure Oil Company, located at Minneapolis, Minnesota, and the territory of his company is the northwestern states: Minnesota, Wisconsin, South Dakota, North Dakota, Montana, Wyoming, Idaho and Washington. (Sinclair Record, p. 120.) The witness states that in the Cities of Minneapolis and St. Paul, Minnesota, his company has 15 competitors and as many more over the remainder of his company's territory. (Sinclair Record, p. 121.) In testifying about competitive conditions this witness states, in substance, that there is an ever increasing demand for gasoline and that in his opinion there is not too much equipment for the distribution of gasoline. (Sinclair Record, p. 123.)

J. M. Welch, a witness for the Commission, whose testimony appears Sinclair Record, pp. 125 to 131, both inclusive, testifies he is connected with the Illinois Oil Company of Rock Island, Illinois, operating in the territory covered by the States of Minnesota, Wisconsin, Iowa, Illinois, Missouri, Kentucky, Tennessee and Oklahoma. (Sinclair Record, pp. 125-126.) As to competitive conditions in the territory of his company the witness testifies in substance that many dealers buy at the same time from

several different companies and that competition is active. (Sinclair Record, pp. 127 and 128.)

The complaint of the Commission alleges an active competitive condition among the many oil companies engaged in business in the territory referred to. Respondent respectfully refers to portions of the complaint, particularly Paragraph Two of Count I and Paragraph Two of Count II, (Sinclair Record, pp. 32 and 34, respectively), wherein the following language occurs:

> "* * * that there are numerous competitors of respondent who, in the conduct of their business in competition with respondent, purchase similar products and purchase and manufacture similar devices, the said devices being used to contain said products, the said products and devices then being handled and stored in the various states of the United States and transported in interstate commerce; that the aforesaid products are sold and the aforesaid devices sold, leased or loaned by such competitors of respondent to various persons, firms, corporations and copartnerships; that in the conduct of their business, as aforesaid, competitors of respondent constantly move such products and devices from one state to another and there is conducted by said competitors a constant current of trade in said products and devices between the various states of the United States; that respondent and many of its competitors have conducted their said business in a similar manner to that above described throughout the past four years."

"BAD MERCHANDISING."

What the Commission regarded as evidence of unfair methods of competition is nothing more than that some witnesses regarded the practice complained of as "bad merchandising."

There is a marked and fundamental distinction between so-called "bad merchandisings" and unfair methods of

competition. The Commission laid great stress upon an affidavit of Seth C. Drake, general manager of the sales department of the Standard Oil Company of Indiana, filed in a companion case bearing Number 85 on the Commission's docket. In referring to the practice of leasing and loaning equipment for a nominal consideration, Mr. Drake in this affidavit said that such practice was inaugurated by the competitors of his company and was adopted by such company merely as a matter of self defense to meet in good faith the competition offered by its competitors, and "that such practice had been and is contrary to the judgment of the sales managers of respondent (Standard Oil Company of Indiana), and is, in their judgment, bad merchandising." This affidavit was read by Commissioner Thompson to several witnesses and their opinion was asked on this proposition. In order to show that the testimony given by such witnesses does not disclose unfair methods of competition within the meaning of the Act, their testimony on this point will be briefly reviewed.

It should be borne in mind that a number of these witnesses in their testimony were not referring to the practice as followed by respondent, which permitted the dealer to sell gasoline and petroleum products of some other competitor, but were referring to a practice where the dealer was prohibited from dealing in any such products except those of the company furnishing the equipment. As before stated, the witnesses testifying concerning this exclusive contract arrangement are Charles L. Smith, W. L. Zust, H. E. Wormhoudt, W. E. MacEwen, O. L. Cordell and W. E. Williams.

From the testimony of Charles L. Smith, president of C. L. Smith Oil & Gasoline Company, St. Louis, Missouri (Sinclair Record, p. 56):

> "Q. Do you agree with that statement (referring to the Drake affidavit)?

A. Absolutely.
Q. Do you think it economically bad?
A. Absolutely." (Sinclair Record, p. 56.)

From the testimony of W. L. Zust, manager of Interstate Oil Company, La Crosse, Wisconsin (Sinclair Record, p. 61):

"Q. Would you say that this method of contracting by way of lease or otherwise for a nominal consideration of a pump and tank is bad merchandising, when bound up with the agreement that they should not use the oil or gasoline of another competitor? (In respondent's case the dealer was not restricted to the sale of respondent's gasoline except through respondent's equipment.)

A. Only under one condition could I see whereby it would be justified.

Q. What is that?

A. That is a small company has competitors that have service stations. They cannot afford to put in a service station and they might afford to put in one of these pumps in the hands of one of the dealers to make them act as their agent or under some similar arrangement of that kind.

Q. That would have the effect, would it not, of cutting off a competitor from getting his oil except from the person who was distributing?

A. It would depend upon the conditions under which the arrangement was made, whether it would be an exclusive arrangement or allow a fellow to handle both."

From the testimony of H. E. Wormhoudt, manager of Manhattan Oil Company of Des Moines, Iowa (Sinclair Record, pp. 66-67):

"Q. (By The Acting Chairman): I am interested in your statement that you would like to break up these two outstanding contracts that you have succeeded to. Why do you want to break them up?

A. It is not a proper arrangement, not a good arrangement from a business standpoint, Mr. Murdock.

Q. You do not regard it as good merchandising?

A. I do not.

Q. Why not?

A. If it is good merchandising there is no limit to which it can be carried. You might just as well furnish a man a truck and furnish him the other equipment in his garage. It might very easily lead to that." (Sinclair Record, p. 66.)

"Q. I wish you would explain that. I do not follow you on the truck proposition. What is the difference between a pump with a tank attached to it and a tin can containing gasoline?

A. I do not know that I get your thought, Mr. Murdock.

Q. If you sell a quantity of gasoline to a man, in a container, you may sell the container to him with the gasoline and it would be good merchandising?

A. Yes, sir, so long as we get a profit on the container it would be; yes, sir.

Q. If you give him a pump and tell him that he shall sell only your gasoline through that pump, and then you charge a price for the gasoline that nets you a return for the value you put into the pump, the money you spent to get the pump to give to him, why is it poor merchandising?

A. Because it never works out that way. You cannot, under the present conditions, charge sufficient for your gasoline to cover the offset. You cannot get more for your product than your competitor is getting; and the margin that you enjoy at the present time does not justify contributing this pump.

Q. Does not that depend somewhat on what the gasoline costs in the first instance?

A. It does; yes, sir. I am speaking of present conditions now. I say it is not warranted under present costs that we have to pay for our stuff, freight and overhead.

Q. If you had a competitor who could get his gasoline much cheaper than you can buy yours, would it not be profitable and a proper merchandising proposition for him to sell the pump, not give it away?

A. It might be.

Q. (By Commissioner Thompson): You would not consider it fair, though, would you?

A. I would not consider it fair. I would simply hold that to be an advantage that the other fellow's capital gave him. My ability to sell merchandise

might be as great as his, but I would not be able, under that proposition, to do business on a parity with him.

Q. (By The Acting Chairman): Then the deduction that I draw from your position in the matter is that you think it is unfair for one man to occupy a position, even by virtue of capital, whereby he could force another member of the community to buy at a loss. That is about your position?

A. That is my view; yes, sir." (Sinclair Record, p. 67.)

From the testimony of W. E. MacEwen, general manager of the National Refining Company, Cleveland, Ohio (Sinclair Record, p. 73):

"Q. Does it ever occur to you that the situation now differs materially from the old times when trade was small, units were small? In your boyhood it was quite common for the merchant to give something 'to boot.' It was in the shape of a gratuity. Giving a pump is something more, as I see it from what I have heard today, than giving something 'to boot.' Is it not?

A. Yes, sir; because you surround that with an iron clad agreement to compel that customer to buy your goods during the time he has that pump in there, whether the quality of the gas deteriorates or not. He is under that obligation to use your goods exclusively. You immediately affect the entire petroleum industry under this kind of a contract." (Sinclair Record, p. 73.)

It will be noted from the answer of the witness MacEwen that he is testifying concerning contracts whereby the dealer is precluded from dealing in any products except those of the company furnishing the equipment, which is not true as to respondent's contracts. Speaking generally of such *exclusive* contracts, the witness further testifies (Sinclair Record, p. 73):

"Q. Apart from the competitive necessity that you are under in making such a contract, did you consider it a good business proposition?

A. I certainly did not. I think it is a pernicious practice.

Q. Wherein is it pernicious?

A. It is pernicious in this way, that it tends to or can tend in time, as the automobile industry grows and as the garage becomes a substantial business—it can tend to put the control of the garage business in the hands of a few large companies that may have capital enough to finance that kind of competition—giving away of something to get business, thereby eliminating competition so far as the other companies are concerned that cannot afford to finance an extensive national campaign of giving away four or five hundred dollars every time they get a contract." (Sinclair Record, p. 73.)

From the testimony of JOSEPH F. KUNZ, secretary of Kunz Oil Company, Minneapolis, Minnesota.

Commissioner Thompson reading the Drake affidavit to the witness (Sinclair Record, p. 82):

"Q. Do you agree with that statement, that it is bad merchandising to give or lease at a nominal sum these pumps and tanks on condition that they will not sell the oil or gasoline of competitors? (Respondent's contracts do not contain such a condition.)

A. Yes, I do."

From the testimony of O. L. CORDELL of Sloan-Cordell Oil Company, Oklahoma City, Oklahoma (Sinclair Record, pp. 90-91):

"Q. (By Commissioner Thompson): Do you consider this giving away at a nominal price of tanks and pumps for a consideration that the purchaser will not use them for anybody else's oil but yours, a good practice in business?

A. No, I do not. I do not consider it good practice.

Q. Would you like to see it done away with?

A. If it could be done away with so it would not injure the small men in the business, like our company, I would like to see it discontinued. (Sinclair Record, p. 90.)

Q. (By Mr. Zechiel): Why do you think it is not a good business practice?

A. Simply because you have a large investment there. It is deteriorating all the time. If no one had them, you would have the same opportunity to get that business.

Q. (By Commissioner Thompson): Competition would be freer?

A. I do not know that it would be any freer than it is now. It probably would be somewhat, but I do not think we would get a bit more business, or any other company would; but we would all get business without the investment." (Sinclair Record, p. 91.)

* * * * *

"Q. Do you mean to say that if you did not have to furnish the oil tanks and pumps to your customers you could not compete more readily with the larger companies who have very much larger capital to invest in this sort of practice?

A. Here is the situation: the large companies are installing their own filling stations as fast as they can find locations. That necessitates larger investments. The small concern cannot do that on anything like as large a scale as the big companies do, and it seems in our part of the country that the larger concerns, particularly, some of them, are not trying to get this garage business. They are not trying to get any business where the gasoline is sold to be resold. They are trying to get all of the business they can through their own stations. As I see it, that is the end toward which they are all working, to market their gasoline direct to the consumer, cutting out the middle man, and thereby, in the course of time, cutting out the independent jobber." (Sinclair Record, p. 91.)

This witness further testifies (Sinclair Record, p. 93):

"Q. (By The Acting Chairman): I would like to ask, Mr. Cordell, this: take this company establishing a filling station, on the one hand, and a jobbing company selling gasoline on the other through pumps; in a contest between the two just what permanent advantage is given the man who has merely

the pump, over his competitor who has the filling station, if the man with the pump is given the privilege of giving it away to the retailer? Where is his advantage in that proposition in a permanent contest?

A. I do not see that he has any.

Q. Then would you say that there is no advantage in the long run in the privilege of giving away a pump to a retailer?

A. I would not say that, unless, the policy and marketing conditions in the business change. There is an advantage at this time. One of the greatest advantages to the loaning of pumps, in my estimation, is that after you once get a piece of business for your product, and your treatment satisfies your customer, you do not have to spend time and money seeing that fellow to hold his business, losing it and getting it back again. You have got it. The other companies, as a rule, have theirs, and I think, as far as actual values are concerned, the business is pretty well divided up. I do not know that any company would have any more." (Sinclair Record, p. 93.)

From the testimony of SETH C. DRAKE, general manager of the sales department of Standard Oil Company of Indiana. (Sinclair Record, pp. 107-108.)

Mr. Drake is handed his affidavit above referred to and Mr. Zechiel, representing the Commission, reads the pertinent portion, after which the testimony is as follows:

"Q. That is a fact, is it?

A. Yes, sir.

Q. How much of an investigation had you made at the time you signed this affidavit?

A. I had taken it up with the sales managers of the entire territory and got expressions from all of them.

Q. (By Commissioner Thompson): Why do you say it is bad merchandising? How do you arrive at that conclusion?

A. Because I never thought it was good merchandising to give a man something to get him to buy something from you."

From the testimony of H. F. BAGBY of White Eagle Oil Refining Company, Wichita, Kansas (Sinclair Record, pp. 109 and 111):

"Q. Is it your intention not to continue this practice or to adopt this practice?

A. Unless we are forced to it. We do not approve of the practice.

Q. Why do you not believe in the practice or approve of it?

A. It is not a profitable way of doing business, we do not think." (Sinclair Record, p. 109.)

* * * * *

"Q. (By The Acting Chairman): You consider it poor merchandising to give away something to sell something, do you not?

A. Yes, sir; that is our attitude." (Sinclair Record, p. 111.)

W. E. WILLIAMS, manager of the Iowa Oil Company, was of the opinion that in certain localities the practice was a good one. His testimony (Sinclair Record, p. 117), is as follows:

"Q. (By Commissioner Thompson): Do you consider it good merchandising to install a pump at a nominal price—as I understand it, that is what you do—and permit a competitor to also install a pump?

A. In some places that kind of an arrangement will work out all right. In others it would not. In the Dubuque territory there is nothing but hills. The people living away back on the hills, if they have to go down on the level to get their supplies, I think in that case it would be all right. Where the drive-in stations are handy I think it is all wrong. We have pumps located out at the outskirts of the city, and it is a very inconvenient matter for the people to go down to get their supplies. Generally those pumps are placed in some little store that is not financially able to get this equipment.

* * * * *

Q. Would it pay you to put in an investment at a nominal sum of three hundred dollars, with the purchaser at the same time putting in the pump of a competitor?

A. Well, no. The idea is here: If they wanted the competitor's line of merchandise they would probably make application to put their equipment in. This business has not been solicited by the Iowa Oil Company, itself, personally; this business has come to us with a request to place these stations at these different points as a matter of convenience to the trade." (Sinclair Record, p. 117.)

L. B. Hancock, manager of Pure Oil Company, Minneapolis, Minnesota, testified that he did not consider the practice as good merchandising because it was giving a man something for nothing, and that he would like to see it stopped. (Sinclair Record, p. 122.)

J. M. Welch, representing the Illinois Oil Company, Rock Island, Illinois, considered the practice as a good one until the advent of the drive-in filling stations, which he thought rendered the practice unprofitable in some instances, but did not condemn it for any other reason. His testimony (Sinclair Record, pp. 129-131) is as follows:

"Q. (By Commissioner Thompson): Do you consider it good merchandising to loan a pump at a nominal consideration to a company in consideration for their selling gasoline for you?

A. Yes, sir; I do.

Q. Do you think it is good merchandising?

A. I think it was good merchandising in the days it was in its bloom, in the days when it was universally followed.

Q. Do you consider it so now?

A. Now, I do not, because it is unprofitable on account of the filling stations.

Q. (By Mr. Burdeau): Is that your personal opinion, or the policy of your company?

A. No, sir; it is my personal opinion. Our company never made it a policy.

Q. Your company is actually opposed to that principle of doing business, is it not?" (Sinclair Record, p. 130.)

"A. We never depended or had to depend on garages and stores for business. We were running our business on different lines than depending on the dealer and the garage for the outlet of our products.

Q. It is not a fact that your company has signified to a representative of the Commission that it was opposed to that principle of doing business?

A. We did as a firm, but as a general practice I do not think it was detrimental to the community. It is safer to handle gasoline. These little dealers could not afford to buy the equipment themselves, and if some big oil company or a number of companies could get a pump and make it safe to handle the gasoline that way, I think it was a good thing.

Q. (By Mr. Zechiel): You testified that they could not afford to handle it themselves?

A. Could not afford to handle a pump.

Q. Could the oil company afford to put in a pump for a little dealer at a loss?

A. If they got a nominal rental of a dollar a month, that would pay at least 5 per cent interest on the investment.

Q. But in many cases they did not get any rental at all.

A. It probably was as cheap a way of getting and holding customers as any other way.

Q. Must it not have been a fact that the oil companies must have made money out of these pumps for these little fellows?

A. They did, I think.

Q. If they made a profit, could not the little man have afforded to have bought his own pump and made a profit?

A. No; the average dealer in these small towns and grocery stores and little garages—the investment would be too great for them. (Sinclair Record, p. 130.)

* * * * *

Q. Do you think it is good business for an oil company to lease or loan a pump to one of these small retailers who does not have business enough to make it profitable? (For the retailer to buy his own pump.)

A. In a great many cases I think it was good business." (Sinclair Record, p. 131.)

H. C. WURSTER, representing the Hawk Eye Oil Company, Waterloo, Iowa, did not consider the practice as a good business policy. (Sinclair Record, p. 133.)

PRICE.

The practice complained of does not increase the p paid by the consumer for products.

The Commission did not produce any evidence that price paid by consumers for petroleum products is in wise increased by the practice complained of. On contrary some of the Commission's witnesses test that the practice had not increased prices. Some nesses testified that the margin of profit, especially gasoline, is so narrow that it is really not profitabl local dealers to handle gasoline; and that the profits in fact made on lubricating oils and other petrol commodities.

In support of these statements respondent refer the following testimony:

> "Well, we in St. Louis have had the pleasur enjoying the lowest filling station market in the c try for the past two or three years, and the ma has been so small that we barely made expense operating through the other fellow's equipme (Sinclair Record, p. 54.) (Testimony of wit Chas. L. Smith.)
>
> "* * * the sale of lubricating oils, as I said fore, is very profitable, * * *." (Sinclair Rec p. 57.) (Testimony of witness Chas. L. Smith.)
>
> The margin on gasoline is small (Sinclair Rec p. 66.) The margin is considerably wider on lu cating oils than on gasoline. (Sinclair Record 69.) (Testimony of witness H. E. Wormhoudt.)
>
> We make a better margin on lubricating oil t on gasoline. (Sinclair Record, p. 91.) Garage claim they lose money handling gasoline. (Sinc Record, p. 82.) (Testimony of witness O. L. dell.)
>
> There is more profit in the sale of lubricating than there is in the sale of gasoline. (Sinclair ord, p. 110.) The construction and operation of ing stations does not make any appreciable differe in the price of gasoline. (Sinclair Record, p. 1 (Testimony of witness H. F. Bagby.)

There is a greater margin of profit on lubricating oil than on gasoline. (Sinclair Record, p. 118.) (Testimony of witness W. E. Williams.)

The margin of profit is considerably greater on lubricating oils than on gasoline. (Sinclair Record, p. 123.) (Testimony of witness L. B. Hancock.)

The average dealer in small towns, the grocery stores and little garages could not furnish their own pumps and make a profit on gasoline. (Sinclair Record, p. 130.) (Testimony of witness J. M. Welch.)

STIPULATION.

Evidence Covered by Stipulation.

Respondent did not produce any witnesses at the hearing before the Commission. Immediately preceding the hearing attorneys for the Commission and for respondent entered into a written stipulation as to certain facts and the same was received by the Commission and filed as evidence in the case.

This stipulation is to the effect that respondent in competition with others in the conduct of its business of refining and marketing petroleum and its products is engaged in interstate commerce, and incident thereto is engaged in the leasing and loaning of devices consisting of oil pumps and tanks; that respondent leases and loans such devices for a nominal consideration on the condition or understanding that the lessees thereof shall not store in and dispense from such devices any petroleum products other than those of respondent; that the rentals received by respondent under such lease contracts do not in all instances represent reasonable returns upon the investment in the devices when the business of leasing or loaning said devices and the returns received thereon are considered separate and apart from the general business and sales policy of respondent. (Sinclair Record, pp. 135 to 138, both inclusive.)

ARGUMENT AND AUTHORITIES.

The Federal Trade Commission is without jurisdiction o authority to make its order, directed against this r spondent, to cease and desist.

A. *No Offense Charged by the Commission's Complai*

The Commission's complaint consists of two counts, th first being based on Section 5 of the Act of Congre approved September 26, 1914 (38 Stat. L. 717) known a the Federal Trade Commission Act; while the secon count is based on Section 3 of the Act of Congress ap proved October 15, 1914 (38 Stat. L. 730), known as th Clayton Act. (Sinclair Record, pp. 32 to 35, both inc sive.) Respondent contends the complaint fails to charg violation of either of said sections of said Acts.

In proceeding under the Federal Trade Commissio Act, before complaint should issue, two things are nece sary:

1. The Commission shall have reason to believe tha respondent has been or is using an unfair method o competition in commerce; *and*,

2. It shall appear to the Commission that a proceed ing by it in respect thereof would be to the interest o the public.

These are correlative propositions. There must b basis in fact for the belief that both situations exis It must appear there is in use an unfair method of com petition affecting the public. Based on these essential the Commission shall issue and serve a complaint statin its charges "in that respect" and give opportunity to th

accused to show why an order should not issue directing it "to cease and desist from the violation of the law so charged in said complaint." If after a hearing the Commission shall be of the opinion "the method of competition in question is prohibited by this Act," it shall state its findings as to the facts, and shall issue an order requiring the accused "to cease and desist from using such method of competition."

Federal Trade Commission v. *Gratz*, 253 U. S. 421, 427.

It is respondent's contention the Commission is without authority to proceed under the Federal Trade Commission Act except in question of public interest. When a complaint issues the respondent is entitled to be advised specifically thereby what public interest is affected, and in what way and to what extent it is affected, by the methods and practices complained of. Otherwise the respondent is not fully apprised of the charges it is required to meet and defend against.

Preliminary and introductory to the allegations in COUNT I of the complaint a general statement is made that respondent "has been using unfair methods of competition in interstate commerce, * * * and it appearing that a proceeding * * * in respect thereof would be to the interest of the public, * * *" a complaint issues. Then follows COUNT I, consisting of three numbered paragraphs. The broad general language quoted is all that is used in connection with COUNT I in charging that what is alleged is either an unfair method of competition or a matter affecting the public. This language, under the most liberal interpretation, is not sufficiently definite or specific to advise respondent wherein the things complained of are unfair methods of competition or in what manner the public is thereby affected.

The first count of the complaint charges a competitive condition or situation arising between individual refining or marketing companies through a practice adopted by respondent and many of its competitors; but not adopted, it is alleged, by some of respondent's competitors. It is alleged as a mere conclusion that those of respondent's competitors who have not adopted the practice complained of have lost customers or business, and that such competitors have failed to follow such practice by reason of their financial inability so to do. It is not specifically charged that the practice alleged to have produced this situation is an unfair method of competition.

COUNT II of the complaint is based on Section 3 of the Clayton Act. Preliminary and introductory to the allegations in COUNT II of the complaint a general statement is made that respondent "has been using unfair methods of competition in interstate commerce, * * * and it appearing that a proceeding * * * in respect thereof would be to the interest of the public, * * *" a complaint issues. Then follows COUNT II, consisting of three numbered paragraphs.

The complaint concludes with a notice of hearing and of the time within which answer must be filed.

What has been said by respondent in respect to COUNT I as to the want of specific and definite allegations is applicable with equal force to COUNT II.

In the second count of its complaint the Commission seeks to charge that respondent is engaged in the leasing and loaning of devices on the condition, agreement or understanding that the lessees thereof *shall not purchase or deal in the products of a competitor or competitors of respondent.*

Section 3 of the Clayton Act makes such agreements unlawful "where the effect of such lease * * * may

be to substantially lessen competition or tend to create a monopoly in any line of commerce." The complaint charges that the effect of such leases may be and is to substantially lessen competition and tend to create a monopoly *in the territories and localities where such contracts are operative*. The statute seeks to curb that which may lessen competition or tend to create a monopoly in any line of commerce, thus dealing with the subjects of commerce; while the complaint is directed to the territorial limits or localities of commerce, thus dealing with the *place* rather than the *subject* of commerce. There is a total variance between the language and provisions of the statute and the allegations and averments of the complaint. In order to give this count of the complaint force or effect it is necessary to read into it, and to assume that it contains, something not found there.

Both counts of the complaint charge that in respect to the devices, the subject of the complaint, there is produced by respondent and numerous competitors of respondent a constant current of trade in commerce which has continued over a period of four years last past. In the second count there is no allegation that any of respondent's competitors are not similarly engaged in commerce; in fact the allegations lead to the conclusion that all refiners and marketers are so engaged. These allegations and averments support the conclusion there is in such commerce no lessening of competition nor tendency to create a monopoly.

Clearly the complaint does not properly or sufficiently allege an unfair method of competition affecting public interest within the proper meaning of Section 5 of the Federal Trade Commission Act.

> "If, when liberally construed, the complaint is plainly insufficient to show unfair competition within a proper meaning of these words, there is no founda-

tion for an order to desist the thing which may be prohibited is the method of competition specified in the complaint."

Federal Trade Commission v. *Gratz*, 253 U. S. 421, 427.

The complaint is clearly insufficient to show that the effect of the practice complained of may be to substantially lessen competition or tend to create a monopoly in commerce. The fair interpretation of the complaint shows a counter effect. Under the rule of construction announced in the Gratz case, *supra*, this count must fail. Construing the complaint in connection with the sections of the Acts of Congress referred to, it appears there is no occasion for the issuance thereof and that the complaint is improvident.

Respondent contends, if all of the allegations of the complaint be taken as true, no offense is charged. To put it in another way: the complaint neither states a cause of action nor charges an offense under Section 5 of the Federal Trade Commission Act or Section 3 of the Clayton Act. While the subject matter of the complaint may be within the Commission's jurisdiction under said Acts; yet the allegations of the complaint are insufficient to bring the subject matter or respondent under the jurisdiction of the Commission in the particular instance for the specific purpose sought by the complaint. No charge is made that warrants the exercise of the Commission's authority, and it should not have heard and considered this cause.

B. *The Commission's Report, Findings and Conclusions Are at Variance With and Do Not Support the Complaint.*

The report, findings and conclusions of the Commission are in substance that respondent in the conduct of its

business in leasing and loaning devices constantly moves the same from one state to another and thereby conducts a constant current of trade in its products and such devices in interstate commerce; that numerous competitors of respondent are likewise engaged and likewise conduct a constant current of trade in petroleum products and devices in commerce; that such leases and loans of devices by respondent are made for monetary considerations below the cost of purchasing and vending the devices when the business of leasing or loaning the same and the returns received thereon are considered separate and apart from the general business and sales policy of respondent; that such leasing and loaning by respondent are on the condition that the devices *shall be used only for the purpose of holding and storing respondent's petroleum products;* that a small porportion of respondent's lessees handle similar products of respondent's competitors; that only a small proportion of such lessees require or use more than a single pump outfit in their business; that many competitors of respondent do not possess sufficient capital and are not able to purchase and lease devices as respondent does, partly by reason of which such competitors have lost numerous customers to respondent; and that the effect of the practice of such leasing under such conditions may be to substantially lessen competition and tend to create for respondent a monopoly in the business of selling petroleum products. The Commission then states its conclusions that such methods and practices are in violation of Section 5 of the Federal Trade Commission Act and Section 3 of the Clayton Act. (Sinclair Record, pp. 139 to 143, both inclusive.) On these findings it bases its order to cease and desist. (Sinclair Record, pp. 143 to 144, both inclusive.)

It is not stated, and there is nothing to indicate, in

the report and findings that the practice complained of comes within the provisions of either or both said sections of the Federal Trade Commission Act or of the Clayton Act. Certainly it is not found that the practice is either an unfair method of competition or one that affects public interest within the purview of the Federal Trade Commission Act. An attempt is made to conform the findings to the provisions of the Clayton Act by stating that the practice may be to substantially lessen competition and tend to create for respondent a monopoly in the business of selling petroleum products. But the findings lack one essential element to bring them within this Act; there is a total failure to find that respondent's lease contracts are conditioned that *the lessee shall not use or deal in the products of a competitor of respondent.* The finding is that respondent's *lessees shall use its devices only for the purpose of holding and storing respondent's petroleum products.* There is a total variance between the allegations of the complaint and the report, findings and conclusions of the Commission. The Commission fails to find what it charges. The thing which may be prohibited is the method of competition specified in the complaint. If the findings are at total variance with the complaint then an order based on such findings is incompatible with the complaint and cannot stand.

> "Such an order should follow the complaint; otherwise it is improvident and, when challenged, will be annulled by the court."
>
> *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 427.

The Commission makes its conclusions which are the general ones that the methods of competition and the business practices set forth in its findings as to the facts are in violation of the provisions of said sections of

said Acts. The conclusions are broad and general. For enlightenment wherein the methods of competition and the business practices of respondent violate said Acts, the respondent is referred by the conclusions to the findings as to facts. Respondent's recourse to the findings fails to advise what competitive methods practiced by it are in violation of said Acts, or wherein they violate the same.

C. *The Order of the Commission Does Not Follow Its Complaint.*

On its report, findings and conclusions the Commission bases its order to cease and desist. (Sinclair Record, pp. 143 to 144, both inclusive.) The order does not amplify such findings or make the same any more specific.

The order directs respondent to cease and desist from:

> "1. Directly or indirectly leasing pumps or tanks or both and their equipments for storing and handling petroleum products in the furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of the same after making due allowance for depreciation and other items usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom, and from doing any matter or thing which would have the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made.
>
> 2. Entering into contracts or agreements with dealers of its petroleum products or from continuing to operate under any contract or agreement already entered into whereby such dealers agree or have an understanding that as a consideration for the leasing to them of such pumps and tanks and their equipments the same shall be used only for storing or handling the products of respondent, and from doing anything having the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made."

Respondent assumes that it will find in the order a complete and concise statement of those practices which the Commission regards as being unlawful, that is as violating Section 5 of the Federal Trade Commission Act or Section 3 of the Clayton Act, or both said sections.

In the first paragraph of the order respondent is required to cease and desist from leasing its devices in the furtherance of its petroleum business at a rental which will not yield to respondent a reasonable profit on the cost of the devices after making due allowance for depreciation and *other items* usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom. In effect this provision requires respondent to obtain a reasonable profit from the rental of its devices; but whether in cash or otherwise the order does not state. The record does not disclose that any person, firm or corporation is engaged exclusively in leasing and loaning devices, and there is therefore no standard of rental values obtainable from a source of this nature. Respondent's business is transacted over a wide territory. In the several states in which it conducts business and in the several parts of those states standards of values differ. What may be regarded in one locality as a reasonable rental profit may in other localities be considered as wholly inadequate or greatly excessive.

The order bases on the cost of the devices the rental profit to be derived. The record discloses that some refiners and marketers buy devices at wholesale, while others buy at retail. Unquestionably, the former buy at less cost than the latter. In basing a rental profit on the cost of the devices the order does not advise whether the wholesale or retail cost shall be the basis. Under such circumstances there is possibility, in fact probability, of a

variance in rental charges that may be imposed by marketing companies.

The order further provides that the profit to be derived shall be based on the cost of devices *after* making due allowance for depreciation and other items usually considered when leasing property for profit. The order does not specify what shall be considered as included in "other items." Apparently it is left to respondent to make the allowance for depreciation and other items, and to determine for itself what shall be covered by the term "other items." The order does not specify who is to be the judge of the reasonableness of the profits to be derived from rentals of devices. It would seem that respondent in conducting its own business is in the best position and is best qualified to determine the reasonableness of its returns from such rentals. It is respondent's view that it is not within the province of the Commission to fix and determine the rate or charge for which respondent shall lease or loan its oil pumps and tanks.

In the case of the *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 428, this language is used:

> "If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved."

In this proceeding and in this provision of the order the Commission has viewed the leasing and loaning of devices by refiners and marketers as a separate and distinct business. Respondent contends it is unfair to consider this item of business separate and apart from its general business and its general sales policy. Respondent also urges, if it is left to determine the "other items" in addition to depreciation for which allowance shall be made in determining its rental charges, it is proper for

respondent to consider the following as included in "other items":

1. The advertising value and advantage to it of its loaned equipment bearing its trade name or trade mark, installed at points of vantage where the same may be seen and observed by the consuming trade.

2. The safety, convenience and accommodation such equipment affords to respondent's customers.

3. The prevention of waste and deterioration of petroleum products sold by respondent.

4. The lessening of respondent's liability for damages from fires or explosions through the handling by its customers and the delivery to the trade of respondent's petroleum products.

5. The reasonable guarantee to the consuming trade of the delivery to it of respondent's petroleum products through such devices.

6. The service and convenience which are afforded the public in obtaining respondent's petroleum products through proper and safe equipment furnished by respondent.

7. The compliance with statutes, ordinances and regulations in the storing, handling and marketing of respondent's petroleum products.

It is urged by respondent that this provision of the Commission's order is without its jurisdiction and authority.

The second provision of the Commission's order requires respondent to cease and desist from entering into or continuing contracts or agreements with dealers in respondent's petroleum products whereby such dealers agree or have an understanding that as a consideration for leasing to them of devices that same shall be used only for storing or handling the products of respondent. It

appears the inhibition has application only to the condition that the equipment shall be used only for storing or handling the products of respondent. In effect this is saying to respondent that it has not the right to determine and impose the conditions on which its equipment shall be leased. Perhaps the Commission might have authority under the Clayton Act to restrict respondent from leasing its devices on the condition that the lessee "shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor of respondent." But we certainly question the Commission's authority to restrict respondent from leasing its devices on the condition that the same shall be used only for storing or handling the products of respondent. Otherwise, the order of the Commission is a new departure in the matter of leasing and loaning property. The title to the devices remains in respondent. It retains its investment therein. It has the right to impose on the lessee the manner in which it shall be used and that such use shall be for a lawful purpose. The prohibited condition contained in this provision of the order is not in violation of either of the Acts of Congress under consideration, and neither of said Acts warrants the Commission in making this provision of its order.

By the order respondent is restrained from doing either one of two separate and distinct acts. Provision is not made that one act shall be contingent on the other. The order regards the performance of either as a separate and distinct offense. In construing the order it is necessary to so regard these two provisions thereof.

Concluding the argument on the question of jurisdiction it is submitted that the Complaint is wholly insufficient to charge an offense under either of the Acts of Congress involved; that the Commission has not alleged facts in such Complaint sufficient to vest it with jurisdiction to

hear and consider the different matters complained
that there its a total and fatal variance between the
gations of the Complaint and the Report, Findings
Conclusions of the Commission; and that the Order
not follow the Complaint, and is not in accord with
Commission's Findings. For the reasons herein st
respondent views the Commission's Order as an exce
its authority and believes that such Order should be
aside.

RESPONDENT'S ARGUMENT IN ANSWER TO COMMISSION'S SPECIFICATION OF ERRORS.

Primarily this respondent is concerned only in those errors which the Commission has charged were committed by the Circuit Court of Appeals for the Seventh Circuit in deciding respondent's case. These are seven in number and in this brief will be discussed in the order in which they appear in the Commission's brief.

The Commission contends there was error:

1. *In holding that the practice may not be held to be an unfair method of competition unless it amounts to a fraud upon some public or private right.*

That part of the decision complained of reads as follows:

> "The jurisdiction under Section 5 exists only where there are practices that amount to a fraud in regard to some public or private right; otherwise, they do not, in our opinion, as we said in the Kinney-Rome case, *supra* (275 Fed. 665), amount to an unfair method of competition."
>
> *Sinclair Refining Company* v. *Federal Trade Commission*, 276 Fed. 686, 687.

The statutory reference is to Section 5 of the Federal Trade Commission Act. By the statute "unfair methods of competition in commerce are declared unlawful," and the Commission is "empowered and directed to prevent persons, partnerships, or corporations, from using unfair methods of competition in commerce." The words "unfair methods of competition" are not defined by the statute. The portion of the opinion, above set out, is in the nature of a definition of the words "unfair methods of competition."

This pronouncement by the court is in conformity with previous decisions and expressions on the subject.

This Court, speaking through Mr. Justice McReynolds has said:

> "The words 'unfair method of competition' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine, as matter of law, what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."
>
> *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 427.

In *Goodyear, etc., Co.* v. *Goodyear Rubber Co.* 128 U. S. 598, it was said at p. 604:

> "The case at bar cannot be sustained as one to restrain unfair trade. Relief in such cases is granted only where the defendant, by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff."

In *Howe Scale Co.* v. *Wyckoff, etc.*, 198 U. S. 118, the Court stated:

> "The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and, if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails."

In *Coats* v. *Merrick Thread Co.*, 149 U. S. 562, it is said:

> "Rival manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their enclosed packages, in the extent of their advertising, and in the employment of agents, but they have no right, by imitative devices, to beguile the public into

buying their wares under the impression they are buying those of their rivals."

Unfair competition is thus defined in Cyc., Vol. 38, p. 756:

"Unfair competition consists in passing off or attempting to pass off, upon the public, the goods or business of one person as and for the goods or business of another. It consists essentially in the conduct of a trade or business in such a manner that there is either an expressed or implied representation to that effect. And it may be stated broadly that any conduct, the natural and probable tendency and effect of which is to deceive the public so as to pass off the goods or business of one person as and for that of another, constitutes actionable unfair competition. The definition is comprehensive enough to reach every possible means of affecting the result."

In Am. & Eng. Ency. of Law, 2d Ed., Vol. 28, p. 409, the following definition is given:

"Unfair competition may be defined as passing off, or attempting to pass off, upon the public the goods or business of one man as being the goods or business of another. Any conduct tending to produce this effect constitutes unfair competition and may be enjoined. The means employed are wholly immaterial. The plaintiff need not show a proprietary interest in the names or symbols employed by the defendant to work the deception. Nothing less than conduct tending to pass off one man's merchandise or business as that of another will constitute unfair competition."

In Nims on Unfair Competition, 2d Ed., p. 2, it is said:

"In the past equity courts usually have not regarded an act as actionable under the law of unfair competition unless such act constituted a passing off of the goods of one person as those of another. In England unfair competition is termed 'Passing Off,' although in other countries the concept of it is much broader than mere passing off of goods."

On p. 4 of the same work, it is said:

> "The legal doctrine of unfair competition is a development of the fundamental idea that it is against public policy that the goods of one person should be offered for sale or sold as those of another."

It can readily be seen how far short of these requirements the acts of respondent fall. There is not the slightest suggestion that respondent is trying to pass off its products as those of a competitor. On the contrary, the dominant purpose of respondent is to guarantee to the public that it is buying respondent's products and not those of a competitor. The practice complained of is peculiarly designed to prevent unfair competition rather than to foster it. The practice was openly followed not only by respondent but, as conceded by the Commission in its complaint against respondent and as shown by the evidence, by a large majority of the marketers of gasoline.

The practice does not prevent any competitor from coming into the same territory and locating pumps and tanks at any point where a market can be found. A sales policy cannot properly be held unfair simply because some competitors, for personal reasons, do not care to dispose of their products in such manner. No court has ever denied, nor have economic theories gone to the extent of denying, to a business organization the right honestly to use its capital to meet the growing demands of a trade, or to furnish facilities and conveniences to the public not previously enjoyed by it. The very universality of the practice, while not conclusive of its propriety, is evidence that the trade has sanctioned it as fair and legitimate.

This holding of the court below is supported by the record and by the authorities.

It is asserted by the Commission that the court erred

2. *In not holding that the methods of competition which have a dangerous tendency unduly to hinder competition are unfair within the meaning of the statute, though the element of fraud be entirely absent.*

It would seem this assignment of error is merely a restatement in another form of the Commission's first assignment of error. It is believed respondent's answer to the first assignment of error sufficiently answers the second one. Furthermore, it is respondent's view there is nothing in the record which warrants the statement, or even the inference, that the practices of respondent have a dangerous tendency unduly to hinder competition. It is felt respondent has aptly shown this by citations from the record set forth herein. (*Ante*, pp. 33-37.)

In any event, it is our view that in order to bring a method of competition within the definition announced in the *Gratz* case, *supra*, it is necessary that there must be present in the method some element of fraud affecting some public or private right.

As to the Commission's complaint that the court erred:

3. *In holding that the leasing of tank and pump equipment at a nominal rental is not an unfair method of competition as against manufacturers of this equipment.*

Respondent does not manufacture tanks or pumps, or their equipment. It purchases the same in large quantities from the manufacturers thereof. This record is absolutely silent as to any complaint by manufacturers of this equipment on the subject of respondent's practice of leasing and loaning pumps and tanks. The method of storing and dispensing gasoline has resulted in a marked increase in the number of tanks and pumps used. The practice complained of has established in business a large number of dealers in various localities not theretofore so engaged. There has opened to the manufacturer of such

devices a market not theretofore enjoyed by him. Obviously, from the viewpoint of manufacturers of devices this wholesale market should be preferable to retail selling to widely scattered local dealers.

At page 11 of its brief the Commission states that the case involves leases to public garage owners and to proprietors of "curb pump stations," but more particularly the latter class.

It has been pointed out in this brief (*Ante*, pp. 28, 30, 31 and 32), that it is the practice of many garage owners to have more than one tank and pump outfit, sometimes owning one outfit, and in addition thereto sometimes leasing such outfits from more than one refiner or marketer.

The Commission erroneously assumes that the thousands of curb pump operators now engaged in business were so engaged when the practice of leasing and loaning equipment was instituted. It is readily discernible from the record and from the history of the practice that a great majority of these so-called dealers were established and set up in business by refiners and marketers and that without the practice large numbers of such dealers would not now be so engaged. As has been said in the Commission's brief, (page 28) the tank and pump constitute a dealer's store. The dealer had, or there was acquired for him, a location at a curb or roadside, at which a place of business was established for him by some marketer or refiner through the loaning and installation of tank and pump; the further inducement being that the refiner or marketer would supply such dealer with the oil products required in his business.

It does not appear that manufacturers of pumps and tanks are also engaged in the business of selling oils. Such manufacturers therefore have not the inducement that a marketer or refiner has to persuade one to engage

as a dealer in oils. The dealer as such usually is created by the refiner or marketer. Probably, of his own volition, he would never have embarked as a dealer, and quite certainly, under all circumstances, as a dealer he would not have been brought into existence by the pump and tank manufacturer, and the establishment of such dealer by a refiner or marketer in the competitive field results beneficially to the manufacturer of the particular equipment involved. It would seem the manufacturer could have no legitimate ground of complaint if a dealer acquires his equipment indirectly instead of directly, or if such dealer does not purchase more equipment than his business requires.

The respondent having purchased its tanks and pumps from the manufacturers, it would seem wholly immaterial to such manufacturers what disposition the respondent may make of the equipment.

There is no condition in respondent's form of contract which in any wise prevents the lessee thereunder from purchasing from the manufacturer any additional pumps and tanks the dealer may require or desire, nor is the lessee prevented thereby from receiving and installing similar equipment of any competitor of the lessor.

It is respondent's view that the marketing field of pump and tank manufacturers has been widely extended and greatly intensified by the leasing and loaning practice, now so nearly universal.

We think the court below was fully justified and clearly correct in holding as it did.

The Commission urges that the court erred:

4. *In holding that the equipment is not leased upon the condition that the dealer shall not sell the products of a competitor of the lessor, though the Commission*

found that only a small proportion of dealers require or use more than one such equipment.

This specification of error amounts to the statement that the court erred in not holding that the *effect* of what the Commission found amounts to what the Commission *charged* to be a violation of Section 3 of the Clayton Act.

It has heretofore been pointed out in this brief (*Ante*, pp. 28, 29, 31 and 32), that the evidence does not support the Commission's finding that only a small proportion of dealers require or use more than one such equipment.

The portions of Section 3 of the Clayton Act, pertinent here, are as follows:

> "That it shall be unlawful * * * to lease goods, etc. * * * for use * * * within the United States, etc. * * * on the condition, agreement or understanding that lessee * * * shall not use or deal in goods, etc. * * * of a competitor or competitors of lessor * * * where the effect of such lease * * * or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Apparently the Commission's position is reduced to these two propositions:

1. While admitting the lease condition complained of does not expressly go to the prohibited statutory extent in the Clayton Act in the restriction of the lessee, it asks this Court to find that the restriction is within the prohibition of the Clayton Act; *and*

2. It further asks the Court, if it find as above, that it further find such restriction has a *possible* tendency toward monopoly.

The covenant contained in respondent's form of contract is as follows:

> "The above described equipment shall be used by

the party of the second part for the sole purpose of storing and handling gasoline supplied by the party of the first part." (Sinclair Record, p. 137.)

It will be observed that this condition applies only to gasoline, and not to other petroleum products, of which lubricating oils are the most profitable. (*Ante*, p. 48.)

As further evidence that respondent's form of lease agreement does not tend to monopolize or restrict the lessee, but in fact makes such lessee practically independent of the respondent as lessor, attention is directed to a further provision of respondent's lease, under subdivision number 6 thereof (Sinclair Record, p. 137), the pertinent portion of which is as follows: "*Upon the termination of this license by whatever means effected, the party of the second part (lessee) shall have the right and option at such time to purchase said equipment by paying therefor the sum of* ....."

It is at all times within the power of the lessee to terminate this contract whenever he might care so to do, and he could prevent the removal of the equipment covered thereby upon payment to respondent of the sum specified as the value of the equipment. It is made possible for any of respondent's competitors to induce the lessee so to terminate the agreement, and, if the competitor choose, supply the lessee funds with which to purchase the equipment covered by the agreement.

Under respondent's form of equipment rental agreement the lessee is in no wise restricted, except that so long as title to the equipment remains in respondent the lessee shall use the same for the sole purpose of storing and handling gasoline supplied by respondent.

The Commission takes the position that the "facts" behind the express wording of the contract bring the lease within the prohibition of the Section. This position cannot be successfully maintained:

First, because the language of the Act cannot be so

broadened as to include contracts not expressly prohibited thereby. If Congress had seen fit to include any classes of contracts other than those enumerated in this Section, it would have done so.

Second, the "facts" do not bring respondent's leases within the prohibitions of the Section.

In support of the Commission's assertion that they do, it is stated:

"(a) That it is extremely rare that a dealer having equipment leased under these terms will have more than one pump and tank outfit upon his premises."

It may be conceded that in the majority of cases these small retail dealers have only one pump outfit; but it cannot be seen what this situation has to do with an agreement of the lessee of pump equipment to use through such equipment only the gasoline of the marketer furnishing the equipment. The fact that retail dealers do not have more than one equipment is not because of any contract relations with respondent or the various other marketing concerns leasing equipment as does respondent, but is solely because there is not sufficient business to justify more than one outfit.

The Commission advances the theory that if a dealer has no business need or use for an additional outfit he will necessarily not install it, and the result is that he *can*, under his contract, deal only in the gasoline of the lessor. The Commission admits that the dealer has a privilege which under the circumstances he will not exercise. It being thus conceded, as it must be, that the lessee has the privilege of dealing in the gasoline of a competitor, how can respondent be charged with an infraction of the law because the lessee does not see fit to exercise rights of which respondent has not sought to divest him? Respondent's guilt or innocence cannot be determined by the acts or omissions of its lessees. If all or the larger

portion of such lessees had, in addition to respondent's equipment, one or more outfits of their own or its competitors, the Commission would not undertake to contend that respondent had violated the Act. Reduced to its ultimate analysis, the question of violation, or not, under the Commission's view depends on the number of lessees whose business is such as to justify more than one pump outfit.

It is shown by this record that in the majority of cases the dealer with whom such equipment is placed did not previously deal in gasoline, and the respondent, or other marketer furnishing the equipment, established a new business and added a new competitive factor instead of restricting competition. It is further shown that this equipment is generally placed with dealers who are not financially able to purchase it and who would not otherwise engage in the sale of gasoline. Unless respondent or some other marketing company thus furnished the equipment, there could be no complaint from any competitor for there would be no market for his products at this particular location; in other words, the market is created by the acts of the marketing company furnishing the equipment. Competition has not been lessened because there was no market to call competition into play until the retail station was established by the installation of the equipment. After such installation is made under respondent's form of agreement, competition is not lessened thereby within contemplation either of the Clayton Act or of the Federal Trade Commission Act for the reason that such agreement does not fall within the provisions of either of said acts.

Every advantageous street corner or location on a public highway offers a possible location for a "curb pump station," where any marketer or refiner, if he be so disposed, may install in business a dealer by leasing to him a

tank and pump outfit. It is respectfully submitted tha the company does not exist that could monopolize all suc locations, or supply them with gasoline.

The order of the Commission, if carried out, woul stifle competition rather than leave it free. Without th order any marketer can establish himself in practicall any locality. The smaller companies say that the practic of leasing equipment is to them a weapon of offense an defense; it being their principal method of competitio against the growing practice of the larger companies o establishing drive-in service stations. (Sinclair Record pp. 90 and 91.)

In its brief the Commission seeks to fortify its positio by citations from *Standard Fashion Co.* v. *Magrane-Houston* (decided by this Court on April 10, 1922), an *United States* v. *United Shoe Machinery Co.* (decided b this Court on April 17, 1922). Both cases are readily dis tinguishable from the case under consideration.

The contract under consideration in the first case con tained an agreement that the dealer should "not sell o permit to be sold on its premises during the term of it contract any other make of patterns." In discussing this clause this Court quoted with approval the following observation of the Circuit Court of Appeals:

> "The restriction of each merchant to one patter manufacturer must in hundreds, perhaps in thou sands, of small communities, amount to giving suc single pattern manufacturer a monopoly of the bus ness in such community. Even in the larger cities, t limit to a single pattern maker the pattern busines of dealers most resorted to by customers whose pur chasers tend to give fashions their vogue, may ten to facilitate further combinations; so that the plain tiff, or some other aggressive concern, instead o controlling two-fifths, will shortly have almost, if not quite, all the pattern business."

There the retailer was restricted by the contract to the sale of patterns of one manufacturer. In respondent's case the dealer is not restricted to the use of the respondent's equipment or to the sale of respondent's products; he must store and dispense through respondent's equipment no products other than those of the respondent. The dealer may at any time terminate his arrangement with the respondent, and upon termination of the agreement he may purchase respondent's equipment at the price stipulated in the agreement. Under these conditions it would seem that the provision in respondent's form of contract cannot serve to lessen competition or have a tendency to create a monopoly within the contemplation of the statute.

In the *Shoe Machinery Corporation* case the Court found that defendant was using, and decreed that defendant should be enjoined in the use of:

"(1) the restricted use clause, which provides that the leased machinery shall not, nor shall any part thereof, be used upon shoes, etc., or portions thereof, upon which certain other operations have not been performed on other machines of the defendants; (2) the exclusive use clause, which provides that if the lessee fails to use exclusively machinery of certain kinds made by the lessor, the lessor shall have the right to cancel the right to use all such machinery so leased; (3) the supplies clause, which provides that the lessee shall purchase supplies exclusively from the lessor; (4) the patent insole clause, which provides that the lessee shall only use machinery leased on shoes which have had certain other operations performed upon them by the defendants' machines; (5) the additional machinery clause, which provides that the lessee shall take all additional machinery for certain kinds of work from the lessor or lose his right to retain the machines which he has already leased; (6) the factory output clause, which requires the payment of a royalty on shoes operated upon by ma-

chines made by competitors; (7) the discriminatory royalty clause providing lower royalty for lessees who agree not to use certain machinery on shoes lasted on machines other than those leased from the lessor."

The condition in respondent's form of lease is that the equipment covered thereby shall be used for the sole purpose of storing and handling the gasoline supplied by respondent. The lessee is free to use other equipment, whether purchased or leased; he is free to buy and sell any marketer's or refiner's products; he is at all times free to cancel his agreement with the respondent; and upon cancellation of the agreement the lessee is free to and has the right to buy the respondent's equipment.

We think the court below correctly held "there is nothing in the evidence nor in the findings of fact by the Federal Trade Commission that supports any such charge," the charge referred to being that respondent made leases for the container and pump and fixed the price therefor "on the condition, understanding and agreement that the lessees thereof shall not purchase or deal in the products of a competitor or competitors of respondent."

If this portion of the charge is unsupported, assuredly it could not correctly be found that the effect of the condition in respondent's form of lease "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The Commission asserts that the court below erred:

5. *In holding that the Commission's order fixed or regulated the rentals of equipment.*

The Commission made the following, among other, findings:

"* * * that the monetary considerations received by respondent do not represent reasonable returns upon the investment in such devices and equip-

ment; and also that such leases and loans of said devices and equipment are made for monetary considerations below the cost of purchasing and vending the same * * *." (Sinclair Record, p. 140, subdv. 3.)

That part of the order referred to reads as follows:

"Now, therefore, it is ordered, that respondent, Sinclair Refining Company, shall cease and desist from:

1. Directly or indirectly leasing pumps or tanks or both and their equipments for storing and handling petroleum products in the furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of the same after making due allowance for depreciation and other items usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom, and from doing any matter or thing which would have the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made.

Provided, however, that as to such pumps and tanks and equipments as are now leased by respondent contrary to the orders contained in paragraphs 1 and 2 herein, respondent shall have four months from the date hereof to enter into new contracts or agreements with respect to the same which shall not be incompatible with the spirit and intent of this order.

It is also ordered, under and by virtue of the authority conferred on the commission by paragraph B of section 6 of 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914, that the said Sinclair Refining Company, respondent, shall within 20 days after the expiration of the time allowed within which respondent shall have fully complied with the order to cease and desist, hereinabove set forth, report in writing to the Federal Trade Commission, fully setting forth the nature of the changes made in the conduct of its business with respect to the subject matter involved in the order to cease and desist, and shall be set forth in such report in complete detail the plan or plans adopted for the lease, loan, gift, or sale of any oil tanks and pumps

for use in storing refined oil or gasoline, which plan or plans are in use or are proposed to be put in use, and also attach to such report any contracts used by the respondent in the conduct of such business." (Sinclair Record, p. 144.)

In passing upon this matter the court said:

> "The necessary conclusion from the above findings and the orders entered is: First, that the Commission deemed it lawful and proper for it to condemn certain rentals and also to fix and regulate the rentals on the equipment; * * *. As we have hereinbefore said, Congress did not bestow upon respondent (Commission) any power to regulate or fix prices (*Sears, Roebuck & Co.* v. *Federal Trade Commission*, 258 Fed. 312); nor do we find anything in the law which indicates that it is illegal for one competitor to do that which is beyond the financial ability of another competitor; nor do we find anything that authorizes respondent to regulate competition for that reason." *Sinclair Refining Company* v. *Federal Trade Commission*, 276 Fed. 686.

By the order this respondent was enjoined from leasing equipments at a rental which would not yield a reasonable profit on the cost thereof, after making certain allowances and deductions; and this respondent is required to report in detail to the Commission the manner of its compliance with the order, the plan or plans adopted for the leasing of equipment, submitting therewith any contracts used by the respondent in that connection. It is true this order does not specify in exact figures the rental rate to be obtained by respondent but it does point out the method by which such rental rate shall be determined and computed. Such computation and determination of the rental charge are required to be reported to the Commission and be subject to its supervision and regulation. It is difficult to see what object the Commission would have in requiring respondent to report in detail to it, submitting forms of its lease agreements, in compli-

ace with the Commission's order, unless the Commission tended to exercise supervision thereover, and give expression of approval or disapproval of the report, the orm of lease agreements, and the rental charges specied therein. If the Commission did not so intend, it ould seem that part of the Commission's order is an idle nd futile thing, and there would otherwise be no object requiring this respondent to comply therewith in the anner specified.

It is our view the court below committed no error in olding as it did.

The Commission also urges that the court erred:

6. *In failing to distinguish between the leasing of quipment upon a nominal consideration for the purpose nd with the effect of suppressing competition in the sale f gasoline and oils, and the usual and ordinary case of a ase of real or personal property with limitations upon he use of the property which did not accomplish an unlawful end.*

The court found that respondent's form of lease agreement is *not* conditioned on the agreement or understanding that the lessee shall not use or deal in the goods of a competitor and in that connection stated that the provisions of Section 3 of the Clayton Act "were the substance of the unproven charge in respondent's complaint against petitioner (Sinclair Refining Company)." The court's pronouncement in this respect is in conformity with the Commission's findings. The specific charge under Section 3 of the Clayton Act as set forth in the Commission's complaint is not supported by the evidence. The Commission so found, or at least it did not make a finding that the charge in the complaint is supported by the evidence. The Commission now complains because the court's finding in this respect conforms to its own finding. The Com-

mission should not be supported in this inconsistent pos
tion.

The court below reached the conclusion that as th
charge in the Commission's complaint was unproven an
unsupported, the contract of this respondent was ther
fore not unlawful; and it found that respondent did, an
had the right to, impose upon the lessee of its propert
lawful conditions as to its use. In comparing the limit
tions between real estate leases and the leasing or hirin
of personal property, the court below announced th
proper rules.

The Commission insists that the court erred:

7. *In holding that some* 450 *retail dealers, parties t the leases, were necessary parties respondent to the Co mission's complaint.*

It seems to respondent the Commission has incorrect stated the holding of the court in this connection. Th language in that respect is as follows:

> "In this case, as in *Fruit Growers Express* v. *Fe eral Trade Commission*, 274 Fed. 205, if an order cease and desist is to stand, the effect of the action the Federal Trade Commission seems to have be to terminate and destroy the contractual rights persons not parties to the proceeding."

This is far from saying that this respondent's lesse are necessary parties to the proceeding. The statemen is, if the order stands, the *effect* seems to have been terminate and destroy contractual rights of persons n parties to the proceeding.

Unquestionably the effect of the order of the Comm sion is to cancel respondent's existing agreements wi its lessees, none of whom is a party to the proceeding. I the order is permitted to stand, this contractual rel tionship would be terminated, and each lessee would that extent be deprived of the underground tank an

pump, which the Commission (at p. 28 of its brief), has characterized as the "store of the retail merchant," saying in that connection that the underground tank "is to the retail dealer in gasoline what shelves, counters and show-cases are to the retail dealer in tobacco, drugs or general merchandise."

Respondent is not insisting, and apparently the court below did not take the position, that respondent's lessees are necessary parties to these proceedings. However, certain contractual rights of respondent's lessees will be affected by the order of the Commission if it is permitted to stand, and possibly the Commission had this very situation in mind in making that provision of its order granting the respondent a period of four months within which to enter into new contracts or agreements with its lessees. In this connection respondent has in mind what this Court had to say on the subject of necessary parties in *United Shoe Machinery Corporation* v. *United States*, decided April 17, 1922.

In concluding this argument on the errors assigned by the Commission respondent respectfully directs attention to the fact that the findings and decision of the United States Circuit Court of Appeals for the Seventh Circuit in this respondent's case are in accord in practically all particulars with the following decisions in the Second, Third and Sixth Circuits involving a practice stated to be substantially identical with that of this respondent.

Standard Oil Company of N. Y. v. *Federal Trade Commission*, 273 Fed. 478.

Gulf Refining Co. v. *Federal Trade Commission*, 282 Fed. 81.

Canfield Oil Co. v. *Federal Trade Commission*, 274 Fed. 571.

LESSENED COMPETITION AND MONOPOLY.

The evidence shows that competition is increased and rendered more keen and active by the practice, and it is an effective instrument in preventing any monopoly in the sale of petroleum products. Many dealers would not be engaged in business if it were not for this practice.

This method serves a marketer as an entering wedge to any territory, and has proved an effective agency in the creation of competition in localities where none previously existed.

It is a matter of public record that at the time of this hearing the Commission had issued similar complaints against a great number of other marketing companies. The record in this case shows that the practice, to a greater or larger extent, is indulged in by practically all of the marketing companies. It could hardly be seriously contended that the practice of one company would tend to a monopoly when the same practice is followed almost universally by other companies in the same line of business. The facts developed furnished their own refutation of the charge.

The test for determining unfair methods of competition is not the gaining or losing of business or customers; yet the only objection made by the Commission to the practice is that certain competitors of respondent, who did not care to follow the practice, were unable to sell gasoline to dealers holding leased or loaned equipment. The fact that the practice causes some companies to make an investment which they would rather not be called upon to make, is no evidence of the lessening of competition. This same situation arises in every branch of trade, and is one that addresses itself to the business judgment of the company affected.

In all of the decided cases, where the stifling of competition or the tendency to create a monopoly has been condemned by the courts, such result was brought about by illegal acts or fraudulent business practices with a consequent injury to the public. No such situation is presented in the instant case, and the contention of the Commission cannot properly be sustained.

NOMINAL CONSIDERATION FOR THE LEASING OF EQUIPMENT AND RESTRICTED USE OF SAME.

The respondent is directed by the Order of the Commission to cease and desist from leasing equipment at a rental that will not return a reasonable profit on the cost of such equipment and from restricting the use of such equipment for the storing or handling of respondent's products. (Sinclair Record, p. 144.)

In that portion of the brief discussing the jurisdiction of the Commission, it has been shown that the Commission is not vested with authority to place either of these restrictions upon respondent in the leasing or loaning of this character of equipment, but it is deemed advisable at this point to supplement that argument and make some further observations upon the invalidity of the Order.

In the case of *Sears, Roebuck & Co.* v. *Federal Trade Commission*, 258 Fed. 307, 312, it was announced that Congress did not intend to restrict an owner of property from selling it at any price acceptable to him or from giving it away, and the same rule applies to the leasing of property.

It is just as reasonable to say that the respondent must secure a direct and reasonable return upon the numerous other appliances necessary in the marketing of gasoline, as it is to say that it must secure such a return upon these

pumps and tanks. It is not possible for a company to secure returns in the way of profits upon every business activity. Large sums of money are expended by respondent and other industries in advertising their products. No direct return is or can be secured upon these expenditures, yet ultimate benefit in the way of profits to the company is expected, otherwise the expenditure would not be made. As previously stated, these pumps and tanks are in the nature of advertising devices, and considering the fact that the approximate cost of a piece of equipment is $300, simply as an advertising proposition the venture may be profitable. This investment at the rate of six per cent represents an interest charge of $18 per year. It is doubted if respondent's product could be more advantageously placed before the public in any other manner at so small an expense.

Previous portions of this brief have been devoted to showing that the restriction placed by respondent upon the holder of its equipment in the matter of storing or handling respondent's products is not an unlawful one, but is reasonable and necessary and works to the benefit of the public, the retail dealer and the marketer. The only complaint of injury is from those engaged in the same line of marketing as respondent, that is, those marketers who sell to the retail dealers. From the standpoint of a competitor, exactly the same business situation is presented if the respondent should appoint a dealer as its agent to sell its gasoline on commission and furnish such dealer the necessary equipment for conducting the agency. It is not and cannot be contended that such a method of vending an article would be in violation of any law, yet the competitor would not be in any better position to sell his products to such dealer than he now is. The same result may thus be obtained by two different methods of business. If the legality of one cannot be ques-

tioned there is no reason why the legality of the other should be.

"BAD MERCHANDISING."

There has been quoted in this brief extracts from the testimony of different witnesses to the effect that they regarded the practice as "bad merchandising." The Commission evidently confused what the witnesses defined as "bad merchandising" with unfair methods of competition. The testimony of these witnesses was simply to the effect that they did not approve of the practice from a business standpoint, and none of them offered any evidence to show that the practice was unfair as such a term is understood within the meaning of the Act. The evidence of these witnesses in a court of law is wholly incompetent to prove the issue; and, furthermore, has no possible bearing on the issue. In the hearing before a tribunal, such as the Commission, it is not possible and probably not advisable to confine the introduction of evidence to the established rules, but the evidence should be at least such as to enlighten the tribunal upon the issue presented.

These witnesses merely expressed their personal views as to whether the practice was good or bad merchandising—not from the standpoint of the public, but solely from the standpoint of profit to the marketers. Those witnesses who saw in it a fair profit and a means of expanding their business, approved of the practice. Those who did not regard it as profitable from a business standpoint or did not have the capital to indulge in the practice, disapproved it, asserting that they regarded it as a bad business policy.

The question whether the practice is bad merchandising is probably the "economic question" so stressed by the Commission; but neither the Commission nor the public

is properly interested in this phase of the controver
A business policy may be unprofitable to the one follo
ing it and may even injure competitors, but somethi
more is required to make it unfair from a competiti
standpoint.

INTERSTATE COMMERCE.

Respondent is not raising any question as to whether
is engaged in interstate commerce in the practice co
plained of in this proceeding.

THE SHERMAN ACT.

A number of cases are cited by the Commissi
throughout its brief construing the Sherman Act.
this Act is concededly not involved in the present case
is not deemed necessary to distinguish respondent's c
from those before the courts in the several cases cited
the Commission.

THE EXTENT OF THE PRACTICE.

The Commission takes the position that the princi
factors to be considered in a particular case are the s
of the organization making the leases or contracts,
territory covered, the number of dealers in a particu
locality, the number under exclusive contract with
lessor or selling company and the size and importance
such retail dealers. (pp. 34 and 35.)

Later in its brief (p. 36) it is stated by the Commiss
a company might institute a policy of entering into s
leases with the express intention of lessening competit
or monopolizing, but if the number of contracts whic
succeeded in securing was not sufficient to accomplish

desired purpose there would be no violation of the Clayton Act; but that on the other hand if such contracts were entered into in such number and under such conditions that the effect was to substantially lessen competition the purpose of the lessor, however innocent, would not avail to take the contracts out of the operation of the statute.

These positions of the Commission appear to be contradictory. In this connection respondent desires to call attention to the fact that the record discloses (Sinclair Record, p. 138) that respondent has in force 459 of its lease agreements, distributed throughout sixteen states, an average of approximately 28 to a state. Under the Commission's line of reasoning even the practical effect thereof would not be to lessen competition or tend to monopoly. This Court in the case of *United States* v. *United States Steel Corporation*, 251 U. S. 417, has said, "The law does not make mere size an offense or the existence of unexerted power an offense."

On page 40 of its brief the Commission states, "Doubtless in most such instances if equipment had not been loaned, dealers would nevertheless have entered the business and competition for their trade would have existed." We have heretofore shown (*Ante*, pp. 31-32) that "the average dealer in small towns and grocery stores and little garages could not furnish his own pump equipment and make a profit in handling gasoline as the investment would be too great. * * * In a number of cases pumps were put in and gasoline handled by dealers who could not afford to buy the pump equipment outright."

The Commission in its brief (pp. 37, 38 and 43) endeavors to show the percentage of dealers having contracts with the respondents in the cases under consideration (except Sinclair Refining Company) and in that connection states that they are dominant companies in the

territory in which they operate. But it fails to state that the smaller competing companies have under contract the remaining percentage of dealers.

EFFECTS OF RESPONDENT'S LEASING PRACTICE.

The following are some of the effects of respondent's leasing practice and those affected thereby:

A. *The Public:*

The record discloses that the price of gasoline is not increased by the practice; and that it conduces greatly to the convenience and safety of the public, and in the protection of the public in its purchases of the brands of gasoline favored by it. The public is in no wise injured. (*Ante*, p. 48.)

B. *The Lessees:*

No complaints or objections are shown on the part of lessees. The universality of the practice is indicative of the lessees' satisfaction with the same. They do not complain of any restriction of their activities.

C. *The Manufacturers:*

Pump and tank manufacturers have not voiced any complaint regarding respondent's practice. The record shows that there has been created for and carried to such manufacturers a remarkably large wholesale market, not enjoyed by them prior to the adoption of the practice.

D. *The Refiners and Marketers:*

The practice is almost universal among refiners and marketers. True, some of them regard the method as "bad merchandizing"; but that is far from saying it is an unfair method of competition, that it lessens competition, or that it tends to monopoly. Those objecting do so

on the ground that they dislike to incur the expense involved. This objection is characteristic of all branches of merchandising. There always have existed, and perhaps always will exist, merchants who, through financial inability or through lack of conviction of the wisdom of the course, hesitate to or are unwilling to adopt progressive marketing methods. It is not the intent or purpose of laws that financial conditions or business sagacity shall be equalized thereby.

As was well said by the court below:

> "Competition is not an unmixed good. It is a battle for something that only one can get; one competitor must necessarily lose. The weapons in competition are various—superior energy, more extensive advertising, better articles, better terms as to time of delivery, place of delivery, time of credit, interest or no interest, freights, methods of packing, lower prices, more attractive and more convenient packages, superior service, and many others, are and always have been considered proper weapons. Expense attending the use of any weapon, the foolishness of it, the fact that a method is uneconomical, or that the competitor cannot meet any method or scheme of competition because it will be ruinous to him to do so, have not, nor has either of them, ever been held unfair. Such things are a part of the strife inherent in competition. Some merchants sell and deliver goods at the counter and you must take them away; others deliver them at your house, or in any town, state or country—that is merely a part of the bargain. Some people deliver a hat in a bag at the store; others deliver it at your house in a fancy box that is used by many purchasers as a container. Petitioner said: 'Here is a container and a pump; you may take and use them for the storage and pumping of gasoline bought from us; if you wish to use them otherwise you may and must buy them.' In kind, that is nothing more than loaning a barrel, with a faucet in it. The fact that the tank and pump are much more expensive does not make the transaction different, nor unfair. If that is not true, then the law

> must mean that the Trade Commission is set as a watch on competitors, with the duty and the power to judge what is too fast a pace for some and to compel others to slow up. In other words, to destroy all competition except that which is easy. We are of opinion that Congress did not intend to bestow any such power, and that it did not intend to do more than to eliminate the almost infinite variety of fraudulent practices from business in interstate commerce."

The financial objection is equally applicable to drive-in service stations. These are expensive of construction. In many localities the larger companies now dominate in this type of marketing facility, and the smaller companies have been unable to follow this lead. Their failure to do so may be prompted by doubt as to the wisdom of the method or be caused by the lack of sufficient funds. That this system of marketing is nevertheless lawful will hardly be questioned.

SUMMARY.

The Situation Under the Federal Trade Commission Act.

Reduced to its last analysis, the Commission's position seems to be:

That there is in this case no violation by respondent of Section 5 of the Federal Trade Commission Act unless (1) the condition of respondent's form of lease agreement monopolizes the business of lessees thereunder or lessens competition, (2) *by reason* of the fact that the equipment is leased for a nominal rental—(3) *and then only* in those cases where the lessees require only one tank and pump outfit.

If this be the situation in this case, then clearly it does not fall within the provisions of the Federal Trade Commission Act.

The Situation Under the Clayton Act.

In its brief (pp. 25-26) the Commission admits that in order to show, in respondent's case, a violation of Section 3 of the Clayton Act it is incumbent upon the Commission to establish (1) that respondent has made leases, (2) upon the condition that lessee shall not deal in the goods of a competitor or competitors, and (3) that the effect of such leases may be to substantially lessen competition or tend to create a monopoly.

The Commission concedes, as it must, that the condition in respondent's form of lease is not that "the lessee shall not deal in the goods of a competitor or competitors" of respondent. But, the Commission urges, under respondent's form of lease its lessees, if they require only a single pump and tank outfit, are *in effect*, if not actually, monopolized, and the *effect may be* to substantially lessen

competition; and that the third essential condition is thereby established, thus conclusively proving the second condition.

Respondent respectfully contends that the Commission has wholly failed to establish either the second or third of the propositions which it admits to be necessary to its success in this case under the Clayton Act. In seeking to establish at this stage of the proceedings the second of the above propositions (admitted by the Commission to be absolutely essential to its case), the Commission is asking this Court to find a condition which the Commission failed to find in its proceedings, and which the court below found is not shown by the record.

Admitting as it does that the condition in respondent's form of lease does not expressly go to the prohibited statutory extent of the Clayton Act, the Commission nevertheless insists that, even though respondent's lessees are free to install other equipment, by purchase or lease, they will not do so if the extent of their business does not warrant it; and that because such lessees do not acquire equipment other than respondent's, such lessees are monopolized and competition as to their business is lessened: not by anything that respondent has done or failed to do, not by reason of the conditions in respondent's lease agreements; but through the failure of such lessees to install equipment other than respondent's. In this roundabout and indirect way the Commission seeks to establish the third essential proposition above set forth.

It is respondent's view that this mere possibility of the lessening of competition or the creating of monopoly is too remote to be regarded as having substantial effect or as having monopolistic tendency.

Respondent submits that for the several reasons set forth in this brief, by virtue of the express admissions of the Commission in its brief contained, and the al-

sence of support in the record and under the authorities for such points as the Commission continues to urge, the judgment and decree of the United States Circuit Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

EDW. H. CHANDLER,
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February 24, 1923.

FILED
FEB 28 1923
WM. R. STANSBU
CLE

In the Supreme Court of the United States

October Term, 1922.

No. [redacted]637

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

STANDARD OIL COMPANY (NEW JERSEY),
Respondent.

No. [redacted]638

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

GULF REFINING COMPANY,
Respondent.

No. [redacted]639

FEDERAL TRADE COMMISSION
Petitioner,

vs.

MALONEY OIL & MANUFACTURING COMPANY,
Respondent.

BRIEF FOR RESPONDENT, MALONEY OIL & MANUFACTURING COMPANY.

CHARLES D. CHAMBERLIN,
HUBERT B. FULLER,
Attorneys for Respondent,
Maloney Oil & Manufacturing Co.

In the Supreme Court of the United States

October Term, 1922.

No. 334
FEDERAL TRADE COMMISSION,
Petitioner,
vs.
STANDARD OIL COMPANY (NEW JERSEY),
Respondent.

No. 337
FEDERAL TRADE COMMISSION,
Petitioner,
vs.
GULF REFINING COMPANY,
Respondent.

No. 309
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Petitioner,
vs.
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BRIEF FOR RESPONDENT, MALONEY OIL & MANUFACTURING COMPANY.

To give attention to the eleven specifications of error relied upon by petitioner in its brief would unduly extend what we conceive to be the proper limits of this brief. We shall, therefore, confine discussion to what we believe to be the points of law applicable to the record for review by this proceeding.

The errors alleged to exist in the opinion of the court below, so far as reviewable in this Court, are comprised in the fifth error as alleged by petitioner in its brief, the substance of which is that the practice condemned by the order entered by the Commission and annulled by the Court is illegal and contrary to the provisions of the Federal Trade Commission Act and the Clayton Act, the first forbidding unfair methods of competition, the second forbidding tying contracts which the Commission concludes the practice in question to be.

THE FACTS.

The facts in the record are clearly and tersely stated by Judge Hough in *Standard Oil Co. vs. Federal Trade Commission*, 273 Fed. 478-9, which we adopt as follows:

> "(1) Petitioners produce and sell refined oil and gasoline, but are not engaged in the manufacture of oil pumps, storage tanks, and containers (hereinafter collectively called 'devices.')
>
> (2) They have been and are engaged in the leasing and loaning of devices, and they also maintain numerous storage stations for oil and gasoline in various states, which stations are replenished by shipments from petitioners' refineries, and the oil so stored is sold and delivered from said stations to retail dealers in the several states.
>
> (3) Each petitioner has leased and is now leasing, to retailers of its own gasoline, devices to be used by such retailers, and in so leasing petitioners have made and are now making contracts or leases with the retailers obtaining devices, under which any given retailer agrees to use his leased device solely for the purpose of storing and vending the product of whatever petitioner furnished him with the device.

(4) The rental or charge to such retailer for any petitioner's device is nominal, and does not afford a reasonable profit or return to the furnishing petitioner considering the value of a device, which petitioners procure by buying from manufac turers thereof.

(5) Petitioners have furnished and are furnishing devices to retailers only upon condition that each lessee uses his leased device only for the purpose of storing and selling therefrom the goods of the lessor.

(6) A majority of the retailers so leasing devices require in their business only a single device, though others may and do procure from each of several dealers in oil a leased device, and use them all, provided that each device is used only to facilitate the distribution of the lessor's product.

Upon the fact findings, substantially stated above, orders have been based, entered April 27, 1920, whereby each petitioner was required to 'forever cease and desist from (1) directly or indirectly leasing pumps or tanks, or both, and equipment for storing or handling petroleum products in furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of same after making due allowance for depreciation; (2) entering into contracts or agreements with dealers in its petroleum products or continuing to operate under any contract or agreement already entered into whereby such dealers agree or have an understanding that, as a consideration for the leasing to them of such pumps and tanks and their equipment, the same shall be used only for storing or handling the products of (the oil dealer proceeded against).'"

In upwards of twenty-five proceedings the stereotyped order of the Commission has been entered, the

validity of which has been reviewed and annulled by Circuit Courts of Appeals having jurisdiction to consider and modify, enforce or amend such orders in the Second, Third, Sixth and Seventh Circuits, reported in *Standard Oil Co. vs. Federal Trade Commission*, 273 Fed. 478, *Canfield Oil Co. vs. Federal Trade Commission*, 274 Fed. 571, *Sinclair Refining Company vs. Federal Trade Commission*, 276 Fed. 686 and *Standard Oil Co. vs. Federal Trade Commission*, 282 Fed. 81.

These opinions have been unanimous, except the last in which there is dissent in part. While the last named case is the only one under review in this proceeding, yet due to the consolidation of the records, the opinions in the other cases are at least persuasive in supporting the integrity of the conclusions herein.

POINTS CONSIDERED.

1. The practice of loaning or leasing pumps and tanks as provided in the contracts as stated is not an unfair method of competition forbidden by the Federal Trade Commission Act. (38 Statute 717, 719, Compiled Statutes Sec. 8836e).

2. Such contracts are not "tying contracts" forbidden by the Clayton Act, (38 Stat. 730, 731, Compiled Stat. Sec. 8835e).

3. The provisions of the contracts are entirely performed in intra and not in interstate commerce and are not under the jurisdiction of the Commission.

1. THE PRACTICE OF LOANING OR LEASING PUMPS AND TANKS AS PROVIDED IN THE CONTRACTS AS STATED IS NOT AN UNFAIR METHOD OF COMPETITION FORBIDDEN BY THE FEDERAL TRADE COMMISSION ACT.

The court below upon this point after citing what this Court said in *Federal Trade Commission vs. Gratz*, 253 U. S. 421-7:

> "The words 'unfair method of competition' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine, as matter of law, what they include. They are clearly inapplicable to practices never heretobefore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

finds as a matter of law that the only standard of legality is that established by the Sherman Act in the words "restraint of trade or commerce" and "monopolize, or attempt to monopolize" with reference to acts "which operate to the prejudice of the public interest by unduly restricting competition or unduly obstructing the due course of trade," and "restrict the common liberty to engage therein," citing:

> *Great Atlantic & Pacific Tea Co. vs. Cream of Wheat Co.* (D. C.) 224 Fed. 566, 573, affirmed 227 Fed. 46, 141 C. C. A. 594;
>
> *United States vs. American Tobacco Co.*, 221 U. S. 106, 179, 31 Sup. Ct. 632, 55 L. Ed. 663;

United States vs. Patten, 226 U. S. 525, 541, 33 Sup. Ct. 141, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325.

Eastern States Lumber Asso. vs. United States, 234 U. S. 600, 613, 614, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788.

Standard Oil Case, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734;

Standard Fashion Co. vs. Magrane-Houston Co., 258 U. S. ——,42 Sup. Ct. 360, 66 L. Ed.——.

The court then says:

"Applying this standard to the trade practice here involved, the first question, that of unfair methods of competition, relates to the leasing of outfits without rentals.

"Is this phase of the practice oppressive upon competitors and does it tend to create a monopoly? Concededly, a lease of a curb pump outfit without rental gives a wholesaler a trade advantage over its competitors. This alone is not unlawful, for such advantage is the object of all competition, and is attained whenever one sells another goods of greater excellence or at lower prices than goods offered by others. Does this trade advantage contain the seeds of monopoly? It admittedly leaves competitors free to install competing outfits in the same locality and in all other localities. It also leaves every competitor free to place its outfit with the same retailer if it can prevail upon him by the ordinary competitive inducements of better goods, lower prices, and easier terms of credit. That the practice imposes upon a competitor the investment of more capital is an argument which would apply with equal force—and with equal infirmity—to competition based on superiority of goods and liberality of credit.

"Under the Federal Trade Commission Act declaring unfair methods of competition unlawful—as the Act stood before the passage of the Clayton Act—a loan of a curb pump outfit without return or a lease without rental did not, we think, tend to create a monopoly, and, accordingly, was not, in our opinion, an unfair method of competition."

The Circuit Court of Appeals for the Second Circuit in *Standard Oil Company vs. Federal Trade Commission*, 273 Fed. 478, on page 481 on this point said:

"We think this reasoning confounds commerce with convenience, besides introducing into trade an element of unfairness, and indeed dishonesty. There is no contract, agreement, or understanding by which any retailer is prevented from selling any brand of oil, and he can own or lease as many pumps as he likes or can use. It is unfair and dishonest to give out from a pump bearing one brand, another maker's oil, and all that secures any one retailer's trade for any one wholesaler is the amount of business the retailer can gather from the community.

"It is possible, when any system of distributing an article of prime necessity and enormous consumption is well established, that temptation arises for competing distributors to enter into treaties regulating prices, classifying customers, or dividing the area supplied into spheres of influence—one sphere for each distributor.

"It may be admitted that one function of the Trade Commission is to discern and suppress such practices in their beginning; but a thing exists from its beginning, and it is not a conclusion of law from any facts here found that a system which at present is keenly competitive, extremely advantageous to the public, and, in the opinion of a majority of the competent witnesses, economical, is at present unfair to any one or unfair because tending to monopoly. A tendency is an inference from proven

facts, and an inference from the facts as found by the Commission is a question of law for the court. As matter of law there is at present no violation of the Trade Commission statute; therefore, the first of respondent's contentions cannot be sustained.

For substantially the same reason the leases of these petitioners do not violate section 3 of the Clayton Act; i. e., the effect of their leases is not 'to substantially lessen competition or tend to create a monopoly in any line of Commerce.' We note *Coco-Cola Co. vs. Butler* (D. C.) 229 Fed. 224, as containing a valuable commentary on this section of the Clayton Act, and the facts of that case are suggestive of the advantages to the public in being reasonably able to rely upon getting the 'gas' he pays for out of any trade-marked pump."

In *Canfield Oil Co. vs. Federal Trade Commission, supra*, the court emphatically adopts the view above expressed. In *Sinclair Refining Co. vs. Federal Trade Commission*, 276 Fed. 686-7, the court says:

"Neither section relied upon gives the Federal Trade Commission power to regulate trade generally. The jurisdiction under section 5 exists only where there are practices that amount to a fraud in regard to some public or private right; otherwise they do not, in our opinion, as we said in the *Kinney-Rome* case *supra*, amount to an unfair method of competition.

In addition to the reasons upon which the decision was based in the *Texas Company* case *supra*, we are of opinion that petitioner had the undoubted right to furnish any and every purchaser such containers and conveniences to aid him in delivering the gasoline into the possession of the consumer as it might see fit, and at such cost as it might see fit. The right to fix prices is not given to the Federal Trade Commission. The only cases where the question of price has come into consideration have been

those wherein the making of a price—in some cases high, in others low—has been used as an element in some fraudulent scheme of oppression. The price which one may put upon that which he has to sell or lease is a matter wholly his own. *United States vs. Freight Ass'n.*, 166 U. S. 290, 320, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Sears Roebuck & Co. vs. Federal Trade Com.*, 258 Fed. 307, 312, 169 C. C. A. 323, 6 A. L. R. 358. * * *"

There is no finding, and no evidence to support a finding of fraud or misrepresentation, the usual basis of unfair competition. This phase is fully discussed with ample authorities in *Kinney-Rome Co. vs. Federal Trade Commission*, 275 Fed. 665, defining "unfair methods of competition" in which the court concludes that this phrase must be considered in legal effect the same as "unfair competition" and "unfair trade" repeatedly considered by the federal and state courts. At page 668 the court says:

> "We conclude, from the discussion of the term 'unfair competition' by the courts, and we are of opinion, that there must be some fraud in trade that injures a competitor, or lessens competition, before it can be said that there has been used an 'unfair method of competition.'"

2. SUCH CONTRACTS ARE NOT "TYING CONTRACTS" FORBIDDEN BY THE CLAYTON ACT.

This phase of the case involves the question of the violation of the provisions of the Clayton Act. At page 83 in *Standard Oil Co. vs. Federal Trade Commission*, 282 Fed. 81, the court below paraphrases the contract under consideration as follows:

> "The form of contract used by the Standard Oil Company is identical in substance with contracts used by the other petitioners. Paraphrased, it is as follows:

Reciting by preamble that the retailer is now purchasing gasoline from the wholesaler for sale to its customers and has requested it to install on his premises equipment for the better storage and handling of the gasoline so purchased, and that in compliance with his request the wholesaler is about to make the installation, it is agreed between them that the 'equipment shall be used solely for the storage and handling of motor gasoline purchased by the' retailer from the wholesaler. Then follow undertakings by the retailer that he will maintain the equipment in good condition at his own cost; that he will not encumber or remove it or permit it to be seized or taken in execution; and that he will indemnify the wholesaler from liability for injuries occasioned by leakage, fire, or explosion of gasoline. The contract concludes with four provisions for its termination. First, upon the use of the equipment by the retailer for any other purpose than the storage and handling of gasoline purchased from the wholesaler; second, upon the retailer's failure for thirty days to purchase gasoline from the wholesaler; third, upon the sale of the premises by the retailer, and fourth, by either party upon five days' notice in writing to the other party, with the right of the wholesaler in any event to enter upon the premises and remove the equipment.

Having stated what the contract requires the retailer to do, the things which it does not require of him are equally important. The first is he is not required to pay any license fee, rental or other thing for the use of the equipment; nor is he restricted in his business to the equipment covered by the contract. On the contrary, he may use other equipment leased by competing wholesalers, or purchased by himself. Nor does the contract expressly tie him to the wholesaler's products. He may freely deal in gasoline or other petroleum products purchased from competing wholesalers.

He may not, however, use the equipment of the contract for storing and handling a competitor's gasoline."

The court then considers and carefully distinguishes the cases decided by this Court recently, holding that certain contracts offend against the provisions of the Clayton Act, from the cases at bar. These cases distinguished are the *United Shoe Machinery Corporation vs. United States*, 42 Sup. Ct. 363, and *Standard Fashion Co. vs. Magrane-Houston Co.*, 42 Sup. Ct. 360. The distinction is sound. In the latter case this Court explains section 3 of the Clayton Act as follows:

> "Section 3 condemns sales or agreements where the effect of such sale or contract of sale 'may' be to substantially lessen competition or tend to create monopoly. It thus deals with consequences to follow the making of the restrictive covenant limiting the right of the purchaser to deal in the goods of the seller only. But we do not think that the purpose in using the word 'may' was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would, under the circumstances disclosed, probably lessen competition, or create an actual tendency to monopoly. That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial."

In view of the number of orders issued against the numerous respondents in these related proceedings it is a strain upon the imagination to conceive that there is even a possibility of monopoly and competition exists only by some restraint of trade.

The court in the Second Circuit Court of Appeals in 273 Fed. 481-2 also comments upon this point as stated in Point 1.

The court in the Sixth Circuit tersely conclude after commending the finding of the Second Circuit, follows:

> "It necessarily follows that for this reason t acts complained of do not violate either the Tra Commission Act or section 3 of the Clayton Act.

From the Sixth Circuit in the *Sinclair Refini Company* case (276 Fed. 688) we quote the following:

> "We are of opinion that there was no viol tion of section 3 of the Clayton Act. The complai under that section is that petitioner made leases f the container and pump and fixed the price ther for 'on the condition, understanding, and agre ment that the lessees thereof shall not purchase deal in the products of a competitor or competitor of respondent' (petitioner). There is nothing i the evidence nor in the findings of fact by th Federal Trade Commission that supports any suc charge. The finding is that there was a unifor contract. There is no word there about purchasin from competitors. The only limitation is that—
>
> > 'The above-described equipment shall be use by party of the second part for the sole purpos of storing and handling the gasoline supplied b party of the first part.'"

The comment of the court below upon this phase the case is so true to the facts that it can hardly b bettered. At 282 Fed. 89 it reads:

> "Many retailers buy and own curb pump out fits. With these we have nothing to do except t note that by the practice of leasing outfits, compe tition with them is greatly increased. We are con cerned only with the retailer who has not mone enough to purchase an outfit, or, having money, doe not care to risk it. What happens? If his localit promises trade, one of the many wholesalers wi

supply him with an outfit without cost and without risk to him. The only condition imposed is that he shall not store and deliver through the outfit gasoline of any other wholesaler. The tying element in the transaction, if any there be, is the one arising from human nature and business sense, namely: that the retailer will install no other outfit so long as he is satisfied with the quality and price of the wholesaler's gasoline, and so long as one outfit serves his trade. The contract leaves him perfectly free to deal in all petroleum products made by competing wholesalers. He is at liberty to install, by lease or purchase, as many other outfits as he may choose and to sell through them as many brands of gasoline as he may desire. The leasing contract, being terminable by him at will on brief notice, permits him to change outfits at will, replacing one by another as often in the course of wholesalers' competition as he is induced to do so. The retailer, regarded in the aggregate, is an actor in the practice, who by reason of his number, place and interest, causes competition between wholesalers to be increased rather than lessened. If the practice is abridged or abolished the retailer's risk is increased and his number diminished, and correspondingly, competition is lessened. Certainly the retailer's part in the practice violates neither of the statutes. Nor, for the reasons given, can we think he is monopolized by the wholesaler, or the territory in which many retailers do business under the practice is monopolized."

The entire purpose in the contracts is to preserve the "device" loaned for the sale of the products furnished by the lessor preventing deceit in that regard by the lessee, which if done, would be the very essence of unfair trade. This Court in *Howe Scale Co. vs. Wyckoff, Seamans & Benedict*, 198 U. S. 118, at page 140 said:

> "The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another."

If the lessee desires to buy and sell the products of a competitor, nothing in the contract prevents, only he must use some other "device" than that owned by the lessor. As a practical matter the "one pump" dealer may prefer not to change, but this is because of his business sense and not because he cannot do so. Fair treatment or excellence of goods may likewise hold the trade of a "one pump" dealer, who owns his own pump, more potently than the lease agreement.

From the nature of the gasoline distributing business and the large number of competitors the distributor under the lease agreement comes very close to being the agent of the wholesaler providing in part the means of distribution and the contract could easily be converted to one of agency without disturbing the flow of business. There would then be a similitude to the case of *Federal Trade Commission vs. Curtis Publishing Co.* Adv. Opinions, Feb. 1, 1923, pages 231-235. At page 235 the court said:

> "Effective competition requires that traders have large freedom of action when conducting their own affairs. Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face. The mere selection of competent, successful and exclusive representatives in the orderly course of development can give no just cause for complaint, and, when standing alone, certainly affords no ground for condemnation under the statute."

3. THE PROVISIONS OF THE CONTRACTS ARE ENTIRELY PERFORMED IN INTRA AND NOT IN INTERSTATE COMMERCE AND ARE NOT UNDER THE JURISDICTION OF THE COMMISSION.

The contracts condemned as unfair and forbidden by both the Acts above are necessarily made for local distribution. That is what a curb pump is for. Whether it or the products have come from beyond state borders both must have come to rest and terminated any and all interstate commerce before the dispensing under the provisions of the contract can begin.

The court in the Second Circuit said, 273 Fed. at page 482:

> "It is, of course, true that if the trade or business under consideration is not interstate commerce the Commission had no jurisdiction."

That question was not pressed in that proceeding. However, in the Sixth Circuit it was pressed, and at page 574, (274 Fed.) the court said:

> "It would therefore appear that this order of the Federal Trade Commission to cease and desist is based upon the theory that the petitioners in the marketing of gasoline and other oil products are engaged in interstate commerce. In view of the uncontradicted evidence and the stipulations and agreements of the parties hereinbefore referred to, this theory is not tenable. On the contrary, this evidence and the agreements of the parties in reference to the facts affirmatively show that the sales business of the petitioners is purely and wholly intrastate. *Bowman*, Atty. Gen. *vs. Continental Oil Co.*, 255 U. S. ——, 41 Sup. Ct. 606, 65 L. Ed.——, decided by the United States Supreme Court June 6, 1921."

After commenting upon the cases relied upon b counsel for the Commission, the court concludes:

> "The findings made by the commission in the cases do not show such an extraordinary conditio of affairs, or any such direct burden, hindrance, discrimination against interstate traffic, as woul call for the exercise of federal control over purel intrastate business. Nor is there any evidence i this record that would authorize such a findin Especially is this true in view of the conclusion w have reached in this case that the practice com plained of is at present not only conducive t competition, but extremely advantageous to th public. *Federal Trade Commission vs. Gratz et al* 258 Fed. 314, 169 C. C. A. 330, 11 A. L. R. 793; *Fe eral Trade Commission vs. Gratz*, 253 U. S. 421, 4 Sup. Ct. 572, 64 L. Ed. 993."

CONCLUSION.

1. There is no charge or evidence of what th courts have heretofore held to be "unfair trade" o "unfair methods of competition" as opposed to goo morals because characterized by deception, bad faith fraud or oppression or as against public policy, becaus of their dangerous tendency to create a monopoly *Federal Trade Commission vs. Gratz*, 253 U. S. 421-42 40 Sup. Ct. 572, 575.

2. The practice and the contracts condemned b the Commission applied only to the equipment fur nished and owned to the lessor to protect the trade nam of the owner under which it was sold which is the ver essence of fair trade. *Denison Mfg. Co. vs. Thoma Mfg. Co.*, 94 Fed. 651.

3. The lease agreement was the most practicable way in which the enormous expansion of public demand

for service could be met, and was almost simultaneously adopted over a large area by a large number of competitors and was open to all. It was not more restrictive than other multitudinous ways and devices to secure trade in competition and met a real demand of the public.

The restriction applicable to the pump and tank furnished by the purveyor did not prevent the dealing in the goods of competitors except by means of the instruments furnished for purveying the owners' goods and maintaining their integrity. *Homer Scale Co. vs. Wyckoff, Seamans & Benedict*, 198 U. S. 118-140; *Coats vs. Merrick Thread Co.*, 149 U. S. 562.

4. There is no such thing as a "germ" of monopoly. The two concepts are incompatible. The court will not indulge in speculation. *United States vs. Transcontinental Freight Association*, 58 Fed. 58. *United States Chemical Co. vs. Provident Chemical Co.*, 64 Fed. 946-950. *Standard Fashion Co. vs. Magrane-Houston Co.*, 42 Sup. Ct. 360.

5. The lease of equipment was necessarily of local application and did not involve interstate commerce and was beyond the jurisdiction of the Commission.

Hammer vs. Dagenhart, 247 U. S. 251;
Pensacola Telegraph Co. vs. Western Union Telegraph Co., 99 U. S. 1;
Bryan vs. Bowser, 209 S. W. 189.

6. Uniformity of the decisions of four Circuit Courts of Appeals upon the same orders of the Commission upon practically the same records by applying determined legal principles weigh strongly in favor of respondents herein. Should the court below be reversed

this respondent would be deprived of the right of the same freedom of contract available to others, to reach which condition further action by the Commission would be necessary.

If the Commission by new orders in the several Judicial Circuits succeed in preventing the practices they have condemned it will be at the expense and inconvenience of the public, as the court below has well said (282 Fed. 81-89).

This respondent therefore most respectfully submits that the decree of the lower court should be affirmed.

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Cleveland, Ohio,
February 24, 1923.

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Office Supreme Court, U. S.
FILED
MAR 2 1923
WM. R. STANSBURY
Clerk

IN THE

Supreme Court of the United States

638

NO. ~~300~~ OCTOBER TERM, 1922.

FEDERAL TRADE COMMISSION, Petitioner,

vs.

GULF REFINING COMPANY, Respondent.

BRIEF AND ARGUMENT FOR RESPONDENT, GULF REFINING COMPANY.

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IN THE

Supreme Court of the United States

NO. 320 OCTOBER TERM, 1922.

FEDERAL TRADE COMMISSION, Petitioner,

vs.

GULF REFINING COMPANY, Respondent.

Brief and Argument for Respondent, Gulf Refining Company.

The purpose of this brief is to supplement respondent's petition for review of the order of the Federal Trade Commission to the United States Circuit Court of Appeals, which is a part of the record. In this petition, specific objections were made to the several paragraphs of the order. There is substantially no controverted issue of fact in the case. The conclusions from uncontradicted evidence are alone excepted to. There will be no occasion to restate these exceptions, as their merits or demerits will be apparent from a reading of the petition.

The respondent has also in its petition attacked the constitutionality of so much of the Federal Trade Commission Law as authorizes action based upon "unfair competition." While the views of the attorneys for the

respondent will not permit the abandonment of these propositions, it is apparent that present further discussion of this question will not be profitable.

The proposition has also been made that the business, the methods of which are complained of, is not interstate business. The applicable law as developed by the adjudicated cases is exceedingly complex. A review of them would tend rather to bring confusion to the simple facts with which the court will deal, and further their discussion is pretermitted.

The Facts As to Respondent, Gulf Refining Company.

With reference to this respondent the evidence shows the following facts:

The concern of which the Gulf Refining Company is a part (hereafter referred to as the "Gulf Company") is engaged in the production of crude petroleum in the several American states and in foreign countries. It is engaged in refining in the State of Texas. It sells petroleum and petroleum products in the Atlantic and the Southern and Southeastern States. In a number of states it has distributing stations and service stations and is engaged in the wholesale and retail business of selling gasoline and other petroleum products. In all of its trade territory it is engaged in active competition with like dealers—having in most instances established its business after its strongest and most active competitors. In addition to stations which it owns and which are operated by its employes, it has made arrangements with a large number of persons by which pumps and tanks and other appliances owned by it are installed, its products being sold to such per-

sons at a price below the retail price and the compensation to these persons being the resulting profit.

In some cases these arrangements are with persons who are already dealers, but in most cases the business is initiated by the company. The Gulf Company is not a manufacturer of these pumps and appliances. It buys them in the open market and at the best price obtainable. It is not, as held by the Federal Trade Commission, engaged in competition with the manufacturers and dealers in making sales and leases of pumps, etc. The purchase by the company of the appliances and the disposition of them is purely and entirely incidental to its business of selling gasoline and other petroleum products. In its own service stations the same appliances, bought in the same way, are used for the same purposes. In leasing them at a nominal rental to persons who handle their products the company assumes that the best and most economical and efficient arrangement possible has been made for the disposition of their products to the public. It is not engaged in the pump selling business, and it buys pumps not to sell but to use in the conduct of its gasoline selling business. It does not stipulate that the dealer shall not sell the products of other concerns, but it does require that its own appliances shall not be used in aiding its competitors. The Federal Trade Commission holds that "the nominal rentals do not afford a reasonable profit to respondent on the amount invested in such devices." The company's profits on the "devices" so leased are the same as those on which it installs in its own stations. On these, as on its refinery building, its pipe lines, its tank cars, there are no direct profits but only that return which comes from the general conduct of a business of which they are necessary parts.

The Proper Application of the Law.

The law should be so construed and applied as to prevent the evils of monopoly without destroying enterprise and initiative.

The interstate business of the country is so tied up with the intrastate business that effective regulation of the former necessarily controls substantially all of the latter. That part of the commerce of the country then which is transportation is under domination of the Interstate Commerce Commission and the Courts, and the remainder of the commerce is under control of the Federal Trade Commission and the Courts. If the activities of these agencies of the Government are confined to the enforcement of definite laws forbidding or authorizing the conduct of business in indicated ways, it will be practicable for the business of the country to be adjusted to the new condition of all pervasive prohibition and regulation. But unless a liberal policy is pursued in construing and applying the law, business must be conducted without the possibility of ascertaining the limitations to which it is to be subjected. Investments must be made, if made, without means being provided of determining whether the contemplated business will meet the approval of those to whom the business morals and business methods have been intrusted.

Under the law business must be so organized and conducted as not to monopolize commerce "or any part" thereof; this is modified by the "rule of reason" which makes business possible but which nevertheless gives to the law the diversity and uncertainty which comes from the existence of many men of many minds.

The laws against monopoly are based upon the assumption of the merits of competition. Apparently

the Trade Commission conceives the competition must be of that enaemic kind that will not permit its being characterized as "unfair." There must be no monopoly which destroys competition and no competition which destroys monopoly. The law-maker finds himself unable to be more definite than is expressed in the admonition "Be Good," and the business man, unable to determine what this means to those who overlooks his affairs, can regulate his conduct by no safer motto than "Be Careful."

If these uncertainties can no longer be used as the basis of an attack on the validity of the law they should at least be considered by the courts in applying its provision to the developing business of America. Indeed this court has already made additions to or clarifications of the law. It has already said in substance that the method of competition in order to be "unfair" must be essentially dishonest, oppressive or in violation of some law. It is not probable that the business of the country will ever be conducted on the basis that would meet the lofty ideals of the man of Nazareth,—at least until the time shall have arrived when courts and commissions may be dispensed with as unnecessary. Keeping business from a competitor or taking business from a competitor would not accord entirely with these ideals, yet coming to terms with a competitor is in conflict with what is regarded as public policy. Great material progress has been made under a system which give a little margin to the aggressor in business. Moreover, the man who has no business and wants to acquire it has been permitted to use methods which do not meet the approval of the man who has business and wants to keep it. Under this aggressive system of competition America has been built, millions of acres of land have been put in cultivation, great cities have arisen, great factories have been erected, great railroad systems have

been developed,—the country has become the most prosperous in the world.

There was certainly no intention on the part of Congress to put the business of the country on an entirely different basis from that which has always served—for America and the balance of the world. The dividing line between business enterprise and cognizable misrepresentation has not been well defined. There has been an allowable lack of conservatism in describing the wares offered for sale. The land agent has been permitted to be liberal in describing the fertility of the soil and the salubrity of the climate. The automobile agent is expected to undertake to impress his prospect with the superiority of his machine. Wool garments have the needed amount of cotton. The smallest fruit gravitate to the bottom of the basket. Railroads print maps which show their lines straight. Lawyers earnestly urge the controlling merits of the cases they cite and deprecate the cases adverse. Refineries take the same crude petroleum, refine by the same processes, and each secures a gasoline superior to any of the others. Exaggeration even enters into public life, and even in appointments to judicial office one may have merits ascribed to him which no less please than astonish him. Exaggeration is the soul of competition.

These things have been and will be. It was not the purpose of the Federal Trade Commission Act to abolish the practices of the centuries, to legislate a great moral reform. While legislation does not these days shrink from an effort to change the morals of individuals, there is nothing in this legislation to indicate a design so ambitious. The seller may still do something and say something; and the buyer would still better beware.

It was not the purpose to legislate morality—to discourage effort—to suppress enterprise—to insure the

purchaser against the effects of his lack of care. It was very evidently a part of the general policy which has its inception with the passage of the Sherman Act to prevent the ills which were supposed to inure in monopolistic control. The policy was based upon the assumption that economic ills would be prevented or cured by competition. The results of this policy have not entirely justified the faith of its proponents, and governmental control of some utilities has taken its place. It is even assumed that competition may sometimes be harmful to the public and that even so standard a device of competition as the lowering of prices may have an injurious effect. Even sometimes the construction of competitive railroads are discouraged and a policy has now been entered upon which if it had always obtained would probably have confined the development of America to a narrow Atlantic strip.

Up to this time, however, the policy of repressive conservatism has been applied alone to those enterprises and industries which are affected with a public use. If the essential indefiniteness of this term has permitted the classification of business not primarily so regarded as public utilities still the great mass of the manufacturing, agricultural and mercantile business of the country has been subject alone to the recognized economic and business rule, the general principle of jurisprudence and the specific rules of criminal law found necessary to prevent abuses. If, however, the views which the Trade Commission entertains as to the purpose of its creation and the power given it obtain, all the business of the country not already under commission control will be taken over for revision and regulation by an extra-constitutional body, the proper exercise of whose functions would imply transcendent business ability, super-knowledge of affairs, rare legal training and discriminating capacity for determining heretofore neglected questions of conscience.

It is respectfully insisted that no such effect was intended. In the formation of trusts, in the amalgamations of great businesses, in the advantageous use of the great prosperity untrammeled business activity had brought to the country, practices had grown up and conditions had resulted of which it had become necessary that the law take cognizance. It had also been ascertained by an effort to practically apply the existing laws, that it frequently became detrimental to the public interests to disturb conditions that had grown up in violation of the law. An effort was made in the passage of the Trade Commission Act to give to the courts expert aid in so shaping its judgments that the minimum of destructive disturbance would result, and to give to business interests of the country protective advice that would prevent violation of laws difficult to understand and apply. There was no purpose to establish a moral censorship, and thus make laws for practical business as diverse as the consolidate conscience of an ever-changing commission.

It must be admitted that this court has not gone as far as this argument would require in limiting the functions of the Commission, but it has placed some restrictions on its exercise of power, and in substituting a judicial conception of "unfair competition" for that of the Commission has added that to the law which makes it measurably capable of comprehension and administration.

The Methods of Respondent Do Not Constitute "Unfair Competition."

Under the views of this Court expressed in *Federal Trade Commission vs. Gratz*, 253 U. S., 421, a method of competition must in order to be "unfair" be

(1) Opposed to good morals as established by recognized standard, because involving
  (a) deception,
  (b) bad faith,
  (c) fraud, or
  (d) oppression.

It is respectfully submitted that the trade practices under consideration involve no one of these elements.

The Gulf Refining Company is a part of an oil organization which produces crude petroleum, refines it, and sells the refined product. This organization has no affiliations of any kind which limits the place or amount of its product, its refining activities, or the places or conditions of its sales. It is in active competition with every other oil concern doing business in America. It produces petroleum as cheaply as it can, buys petroleum as advantageously as possible, transports it as cheaply as it may be done legally, refines it as well and as economically as the conditions of the art permits, and sells the residue and the refined product with as much profit as it can legitimately make. It is purely a business organization which obeys the laws of the countries in which it operates because it is right, and obeys the natural and economic laws because they cannot be escaped or evaded.

In its rapidly expanding business, built up entirely under competitive conditions, it has gone into places where the public was already served—indeed it has

rarely been able to find entirely virgin territory. In order to secure business it has usually been compelled to take business that had theretofore been done by somebody else. The taking of this business cost it something and cost its competitor something. All this expense—of itself and of its competitor—has doubtless usually been passed on to the public for payment. Certainly unless the expenses of competition could be borne by the public competition would not be possible. But it is assumed that the advantages to the public more than counterbalance that which it pays for duplication of the cost of service. This is the basis for all the anti-monopoly legislation,—and doubtless this legislation must be made effective, or the field of price-fixing enlarged. At all events the Gulf concern adjusts itself to the law and the conditions which it finds as it undertakes to expand, and practically everywhere it has gone it has furnished or met competition. If in this competition nothing is done except that which secures the approval of a competitor nothing will be done which will benefit the public. It may be necessary to secure the services of a good man. To secure him may involve giving him more than someone else is giving, and thus depriving a competitor of a good employe. It may be necessary to cut the price—thus preventing a competitor from getting what his product is worth. It may be necessary to establish a station more convenient than that of the competitor—thus subjecting him to loss, or requiring him to make expenditures he would not otherwise incur. It may be necessary to establish a more attractive station, give free air service, be liberal in the matter of credit—all of which imposes a burden on the man already established which he would like to escape, and which may impose an increased expense on the industry which the public would like to escape. But these are incidents of competition—these or the like

must be indulged in if there is in fact competition. If the newcomer undertaking to establish himself should make untrue and dishonest statements concerning the wares of his opponent, and make with regard to his own wares statements affirmatively false and not merely the permissible expression of business enthusiasm or enterprise the competition could be classified as "unfair."

In establishing competition the Gulf concern has confined itself to securing employees of activity and courtesy, to furnishing a superior and uniform product, to establishing convenient and attractive stations, to installing safe and easily used appliances. No other ways are open that do not involve violation of good business principles or good morals. But within these lines it regards itself as having the right to go as far as it may choose.

The suggestion is made that one of its competitors manufactures the appliances which it uses in the way criticised by the Commission. The Gulf does not conceive that this circumstance in any way affects the question of unfair competition between it and other oil concerns. The Gulf certainly cannot be said to be in "unfair competition" with any maker of pumps or tanks. All the pumps and tanks that it uses are purchased in the open market. It pays the prices fixed by the manufacturers. The sellers know the purposes for which the purchases are made—the manner in which they are to be used. The sales are not compulsory. When the Gulf buys these "devices" it is without restriction as to use, and it feels that it has the right to use them and it does in fact use them in the manner which seems best calculated to improve its position as a competitor with the other concerns engaged in the oil business in the territory in which it has been able to establish itself.

The general policy of the Gulf company is to establish its own stations and sell its products directly to the consumer. This policy is not adhered to when it results to the detriment of the primary purpose of the business,—the production and sale of petroleum and its products at a profit. At some places the conditions may not justify a fully equipped station with the necessary employees. The expense might be out of proportion to any possible profit. There are other places where the amount of business might justify a station, but where the business is already controlled by someone whose hold it would be difficult to disturb. Sometimes it may be this dealer can be persuaded to become the agent of the company. In such case the Gulf Company may install its pump and tank and give a convenient, clean and safe service with appliances which it has bought upon the open market and which it owns and which it may do with as it pleases, even to the point of benefiting the public and itself.

Instead of securing the services of the man already in business it may be that the Gulf may conclude that the best arrangement that may be made is to sell its products to him. It may be that he is unable or unwilling to install the Gulf appliances. If these should be sold to him at the cost to the Gulf it may mean an investment not warranted by his business. It may be that the appliances of a Gulf competitor is already installed and the local dealer can see no advantage to himself in substantially duplicating that which he has. But the Gulf can see an advantage to itself in getting the pumps and tanks installed. The installation will enable it to get its products before consumers who have heretofore not known of their merits. The contract will provide that these appliances may not be used except for Gulf products. This will reasonably insure that the public will get Gulf products and not

products lacking their merits. In doing this it has violated no right of the local dealer. It has not violated any right of the public; on the contrary it has given the public an enlarged choice of petroleum products, and has insured that it will be furnished quickly, conveniently and safely. It has violated no law; on the contrary it has extended and made effective the competition which the law encourages. Doubtless it would have been more profitable and generally advantageous to the company if the established dealer could have been employed as an exclusive agent. In such case, no question would have arisen as to the legality of the act (*Federal Trade Commission vs. Curtis Publishing Co.* S. C.) It is difficult to conjecture how a qutstion could have arisen with reference to an act that in its essence is the same, except that it preserves the independence of the dealer and enables him to continue to enjoy the benefits which competition among wholesale sellers of gasoline brings to him—which benefits he may divide with his public if he chooses.

It is urged that the ability of some companies to furnish pumps and other appliances puts at a disadvantage dealers who are without sufficient capital to pursue a like policy. The objection would be just as valid against the direct use by the larger companies of expensive sale appliances, or of the acquisition by them of desirable but expensive locations for stations, or the construction of attractive and convenient stations, or putting up attractive signs or indulging in other expensive advertising, or the paying of high wages to men who demonstrate extraordinary capacity for salesmanship. The objections could be extended to the erection of large refineries, to the installation of long pipe lines, and to the acquisition of high-priced producing properties. The larger companies have advantages in each of these particulars over companies

not so adequately financed or not so fortunately equipped. Every oil concern has the advantages which its properties and its organization gives it, and most of them must meet the competition both of those with more capital and with those of less, both with those of better organization and those of less efficient. But it is an actual and an efficient competition which has grown up under the protection of the law. It is a competition that is beneficial to the public. The growth in the demand for gasoline is perhaps without precedent. By the bold and efficient use of capital the needed petroleum has been secured, the necessary pipe lines have been laid, the great refineries have been erected, the efficient and safe distributing systems have been developed. Rarely has so stupendous a thing been so quickly and so efficiently done. This has been under laws that have not permitted monopoly and which have interfered when monopoly has threatened. Any infraction can be punished, as infractions have been punished. But under these laws ample freedom was allowed. If now the freedom of initiative and action is to be superseded by bureaucratic control, if the conduct of the business is to pass from the hands of experts who have demonstrated their capacity to those of men unfamiliar with this business and not eminent in any, doubt may reasonably be entertained if this industry still under the strain of an unprecedented growth can meet the problem immediately ahead.

The Interdicted Practice Has No Tendency to Monopoly.

The dissenting opinion of Judge Morris of the Circuit Court of Appeals puts as strongly as may be the argument that the practice under consideration has a tendency to create a monopoly.

Respondent has no disposition to question the established principle that in passing upon the questions here involved the actual conditions under which a contract operates and the effects will rather be considered than its mere verbal terms. It is, of course, assumed by the sellers of petroleum that the installation of its "devices" will have some effect in influencing the person to whom it has delivered them. If there was no such effect the company would doubtless be without any sufficient business reason for supplying these convenient and safe devices for the benefit of the public. It is also doubtless the case that in most instances one set of "devices" is all that the retail dealer requires to furnish gasoline to the public. This argument can be indefinitely extended and applied. One dealer for the community may be enough. One refinery for the nation may be enough. Possibly economies might be effected by this concentration and cheaper gasoline might be possible.

But the system which the law undertakes to maintain is not concentration and monopoly, but competition, and competition has been promoted by the system under attack. The dealer who has installed the devices of one company may also secure those of another company if the amount of his business and the way in which he handles it suggests to the second company that an arrangement with him is better than one with some other dealer or person in the community and better

than the establishment of a service station owned by the company. Under the terms of his contract the dealer has a right to put in other "devices." He may choose to do it to procure for himself the benefit of relations with more than one company, or to meet the demands of the public for more than one brand of gasoline. He has unrestricted right and power of action, the companies have unrestricted right and power of action and the public has unrestricted right and power of action.

As heretofore suggested the installation of "devices" will not be without effect. Everything done in competition has its effect, or it fails in its purpose. But the effect is not improper or illegal. If instead of making a contract of the kind under consideration a company installs its own station it is manifest that this would have a much more definite and conclusive effect. All improvement in quality of a product, all efficiency in its handling, all extraordinary courtesy in employees, all advertising makes for increase in the volume of business—for concentration—for monopoly—for increasing the difficulty of a competitor in entering the field—for decreasing the number of competitors who undertake to enter. The establishment of a station of any kind by one company would not be without effect in the determination by another company of whether it would establish a second. The purpose of all competitors is to secure sales that would otherwise go to somebody else, and monopoly may be the result of thoroughly effective competition.

The business methods discussed do not come under the ban of the law, but are encouraged by it; the practices under consideration herein are not without effect, but they are effects which inure to the benefit of the public without being unlawful or unethical.

In a series of paragraphs in its brief the Trade

Commission undertakes to establish that the public convenience could just as well be subserved by the "devices" if the dealers were not required to confine their use to the products of the owner. It is scarcely necessary to argue that the appliances would be useful and beneficial whether one brand of gasoline or another was handled through them. It does not however follow that as many of these "devices" would be available to the public as under the present conditions. There has never, at any time, been anything to prevent a dealer from purchasing outright "devices" as efficient as those he may now lease,—if he has the business to justify their installation and the money with which to pay for them. But it is very safe to say that many "devices" have been installed that would not have been except for the aggressiveness of the larger companies amply able to finance their campaigns of competition.

The actual effect upon competition is indicated even by the brief of the Commission, which says "There is considerable evidence in the record showing that in some localities more installations are being made than are required, either for public convenience or for economical distribution by wholesale marketers." The brief further suggests "any installation beyond this (that is enough to meet the convenience of the public) will not only not result in benefit to the public but will tend to impose undue burdens upon consumers." With this statement that competition has been and is very active respondent will have to agree but it is not ready to join in the attack made by the Commission upon the law,—for whatever may be the demerits of competition as an economical system it is perhaps not as objectionable as either monopoly or Commission control.

The Commission has utterly failed to establish that there is monopoly or tendency to monopoly. They have affirmatively established that within the territory

covered by the activities of the companies whose cases are herein combined there is active and effective competition between these concerns and many lesser companies operating in the same territories. The Commission says that a certain percentage of the dealers are under what it calls "exclusive contract,"—though the contracts of course are not exclusive. It does not, however, show how many of these dealers came into being upon the initiative of the respondents. The business has greatly grown and the competition has greatly grown. In making one part of its argument the Commission forgot what it elsewhere develops—that the competition is so active in some communities as to exceed the public needs. And this suggests the essential considerations which are ignored by the Commission—that the competition is not in the acquisition of the business of the middle men, but in securing the patronage of the public. That which this company is undertaking to do is to get its product to the public with as little expense to itself as practicable. Sometimes and at some places it has found it advisable to make contracts with persons already in business. Sometimes it has found it advisable to undertake to sell to a dealer who has already established relations with another company. This relation is an embarrassment neither to the dealer nor the company. Each of them knows that if the dealer refuses to buy the company can find someone else already in business or willing to enter the business who will handle its products. The dealer secures the benefit of competition for himself by installing new "devices" or the public secures the benefit of the competition of a new dealer, who will install them.

Practically all of this company's business has been established in trade territory theretofore entered by its competitors. It has found trade relations already established between these competitors and the dealers

not easy to overcome. Other factors have presented quite as many difficulties as free pumps. The thought has not arisen, however, that either this "exclusive contract," or courteous treatment, or satisfactory form of credit, or a satisfied public constitutes unfair competition or bring about the evils of monopoly. It can even understand the attitude of some of the older and longer established concerns who are said by the Commission not to favor these "exclusive contracts," and who while having them would prefer to make sales of "devices." There is no good reason why they should not prefer the elimination of all methods by which new concerns establish themselves in competition with those already established. It is easy to understand, too, why those whose wholesale supply is precarious, whose selling organization is inefficient or whose capital is inadequate should call upon the Government for help in a competition with those who have undertaken to give stability and permanency to their business.

It is apparent that competition instead of being limited or suppressed has been greatly and effectively developed.

The respondent prays that the judgment setting aside the order of the Trade Commission be maintained.

GULF REFINING COMPANY,
By R. L. BATTS,
General Counsel.
W. J. GUTHRIE,
Assoc. Gen'l. Atty.

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36283—23——1

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

FEDERAL TRADE COMMISSION, PETITIONER, *v.* SINCLAIR REFINING COMPANY, RESPONDENT.	No. 213.
FEDERAL TRADE COMMISSION, PETITIONER, *v.* STANDARD OIL COMPANY (NEW JERSEY), respondent.	No. 637.
FEDERAL TRADE COMMISSION, PETITIONER, *v.* GULF REFINING COMPANY, RESPONDENT.	No. 638.
FEDERAL TRADE COMMISSION, PETITIONER, *v.* MALONEY OIL & MANUFACTURING COMPANY, respondent.	No. 639.

REPLY BRIEF FOR PETITIONER.

The present brief is by way of reply to the briefs of the Sinclair Refining Company, the Gulf Refining Company, and the Maloney Oil & Manufacturing Company, the brief of the Standard Oil Company (New Jersey) not having been received on account of the sickness of counsel. We would respectfully

request the privilege of filing a brief in reply to the forthcoming brief of last-named company should we desire to do so.

REPLY TO BRIEF OF SINCLAIR REFINING COMPANY.

We are in serious conflict with opposing counsel in regard to the bearing upon this respondent of important evidence on behalf of the Commission.

Opposing counsel make an effort to neutralize large portions of the testimony in the western group of cases, among which the case against the Sinclair Refining Company was one. (Brief, pp. 14 to 33.) For such purpose they distinguish between evidence on behalf of the Commission, which specifically refers to the Sinclair Company, and evidence which relates to a practice which counsel asserts is not indulged in by his client corporation, and evidence on behalf of the Commission which has general application to the practice charged against the company.

These distinctions are not justified by the record and are exceedingly misleading. The evidence adverse to the practice is evidence against this respondent irrespective of specific reference to that corporation. Six cases were tried simultaneously relating to the practice as indulged in by concerns in Mississippi Valley States west of Ohio, among which was the case against this respondent. Therein testimony relating to the general nature and the effect of the practice was heard as regards that entire group of cases simultaneously, although the cases were not consolidated as to the interstate character

of the trade each corporation conducted, the extent to which they had engaged in the practice, and similar matters which had been previously covered by stipulations.

Objection to the method thus pursued, if it had ever been appropriate, is certainly no longer proper, inasmuch as the testimony was taken upon the basis stated without objection on the part of counsel. (Sinclair, Rec. p. 77.) Counsel for this respondent was under misapprehension as to the scope of the hearing but did not object to the plan of procedure nor ask for the recall of witnesses examined in his absence. (Record, Id.) He can not equitably object now.

The fact that only occasional reference to the Sinclair Refining Company appears is a negligible consideration, since that company, by stipulation, has admitted that it engaged in the practice and the extent of the employment thereof. (Stipulation, Sinclair, Rec. p. 136.) Evidence, therefore, of the effect of the practice upon competition is distinctly binding upon this respondent.

Turning now to the second distinction, in order to show its misleading character we shall be obliged to refer in brief fashion to the testimony of the Sinclair witnesses from whom opposing counsel quote.

The witness Smith clearly had in mind contracts with lessees which restricted the lessee to the use of the product of the leasing corporation in the equipment leased, and not to contracts which would ex-

pressly prohibit the use of the product of another company in other equipment. The language quoted by opposing counsel (Brief, pp. 22, 23) is expressly corrected in his testimony that the contracts to which he refers provide that "no gasoline but ours shall be handled through this equipment" (Sinclair, Rec. 50). The lessee "can install a pump belonging to some one else." (Sinclair, Rec. p. 51.) The reason for his making the confused statement quoted by opposing counsel was simply that the witness did not distinguish between a restriction absolute upon its face and a restriction which permitted the installation of other equipment not owned by the leasing corporation, and the use of another's product therein. He testified that "none at all" of his customers had "more than one outfit on the premises." (Sinclair, Rec. p. 51.)

The witness Zust was also talking about the only practice which he knew anything about, namely, that where the lessee is prohibited from "permitting anybody else to put their oil through that pump and tank." (Sinclair, Rec. p. 61.)

Witness Wormhoudt was clearly testifying about the form of contract in which the lessee is enjoined "that he shall sell only your (the lessor's) gasoline through that pump." (Sinclair, Rec. p. 61.) This witness, also in the testimony quoted by opposing counsel was referring to the only situation he knew about. He said, "I have never seen a garage that had over one equipment." (Sinclair, Rec. p. 61.) If a retailer has but one equipment, each type of

restriction effects a complete restriction of the filling station.

The loose reference made by witness Mac Ewen, as quoted by opposing counsel, is explainable upon precisely the same ground. He testified that "in the ordinary course of business among the ordinary garage people and retailers of gasoline, the universal practice is to have just one pump outfit." (Sinclair, Rec. p. 74.) Hence, the absolute restriction and the restriction limited to the equipment leased are absolutely identical under the circumstances this witness had in mind.

The witness Cordell is in the same category. The pumps which he leased were on condition "that the gasoline stored in the equipment and sold through it was to be our gasoline." (Sinclair, Rec. p. 87.)

Once more opposing counsel have, in the case of witness Williams, recited evidence in a misleading manner. Williams's company had used two types of contracts, one of which contained a prohibition, absolute in its terms against the use by the lessee of any gasoline whatever other than lessor's. This form, however, had been abandoned and was not introduced into the record, and Williams's testimony clearly related to the effect of the nominally less drastic of the two forms of restrictive covenant, the same as that of respondent. The instruments then in mind were specifically those in which the lessees "were to use only our gasoline (i. e. of witness's company) in the pump during the life of the agreement." (Sinclair, Rec. pp. 115, 117.)

While there is a certain plausibility in the quota
tions made from the record by opposing counsel i
this relation, the whole situation is clear when it i
borne in mind that the almost universal custom
among the retailers of gasoline is but one equipmen
at each station other than service stations owne
by a producing corporation. The distinction sough
to be made is not a genuine one.

Few additional comments need be made upon th
answering brief in the Sinclair case. We would say
that counsel have gone widely afield from the record
in many of their contentions. Their complaint se
up the necessity of the leasing practice in order t
secure safety in the handling of gasoline, protection
to the quality and trade-marks of the corporation
convenience, and service to the public.

Counsel briefed these points as though they had
proven them, but the Sinclair record is silent thereon
Their defense, therefore, has failed in such relation
and their brief should have been oblivious of such
defenses. We refer to the discussion of the supposed
advantages in our brief (pp. 52 to 65).

We concur in the views of opposing counsel that
the practice might be "bad merchandising" and yet
might not constitute an unfair method of competi-
tion. That it is "bad merchandising" is, however,
assuredly evidence that the practice is not necessary
to secure the supposed advantages counsel dwells
upon without having supported.

Every witness of record in the Sinclair case but
one is opposed to the practice, and most of them have

been elaborately so quoted in counsel's brief (pp. 38 to 47).

On the other hand, counsel are in error in assuming that the Commission did not make a case as regards the lessening of competition.

There is evidence that the leasing practice with restrictive covenant "tends to concentrate business among a chosen few" and "to eliminate competition." (Sinclair, Rec. p. 74.) Also it "tends to reduce the number of competitors to only the strongest companies in the field" (Id. p. 83), and when you have leased an equipment with restriction "you do not have to spend time and money seeing that fellow to hold his business, losing it, and getting it back again. You have got it." (Id. p. 93.) For the period of the lease the practice limits competition (Id. p. 131); and it has the same effect as to lubricating oils "absolutely," having "cut down competition in the lubricating business" (Id. p. 57). It "certainly" cuts down competition between gasoline marketing companies. (Id. p. 61.)

So far as the Sinclair record is concerned this evidence is absolutely uncontradicted.

Opposing counsel's position is grounded in the theory that the public is sufficiently protected against the lessening of competition provided the wholesaler leaves the retailer the naked legal right to install additional equipment for handling the gasoline of other companies, and the privilege of acquiring the equipment leased. The retailer, however, has no

interest in installing other equipment beyond the needs of his trade, nor in paying out good money to buy equipment which is already gratuitously loaned to him. His business does not demand that he adopt either course, nor will he go to inconvenience and expense in order to see that the public is served by several gasoline marketers.

The position of the defense would entrust the preservation of competition between marketing companies to the foresightedness and statesmanship of retailers in gasoline and their willingness to put themselves out for the public good. Whereas, it is our contention that Congress does not intend to leave the matter to such hazard.

Questions of law, we believe, have been sufficiently covered in our opening brief.

REPLY TO BRIEF OF GULF REFINING COMPANY.

Counsel for this respondent likewise rely upon the legal right of the lessee to ward off the lessening of competition by buying additional equipment and using therein competing gasoline, "if he has the business to justify their installation and the money with which to pay for them." (Gulf brief, p. 17.) But the record shows that the lessees do not have the business to justify it, and counsel admit that most instances support the justice of the Commission's finding that lessees require and have but one equipment each. (Gulf brief, p. 15.) The fact is that it would be a business mistake for the retailer to put in other, or to purchase it unnecessarily.

On the contrary the leasing retailer is taken out of the competitive field and the competition for his business is destroyed. (See our opening brief, p. 16.) When any territory has as many retailers as can find remunerative trade and these are restricted by this practice, competition can not but be lessened—the opportunity to establish a delivery route is gone.

To insist that competition has increased because additional retail dealers have been established is to confuse increased volume of business with increased competition. The volume of business and the number of distributing stations may be doubled in an industry where there is a complete monopoly.

If it were admitted that the practice has resulted in the establishment of new outlets, still the question whether the practice creates or increases competition would remain to be determined from the circumstances of the particular case. (See our brief in chief, pp. 44–47.)

Counsel would have the court believe that Congress is interested in gross volume of trade, instead of in the forestalling of methods which make for the lessening of competition for trade, whatever be its volume.

There is tremendous competition to tie up individual retailers, and this has been mightily increased by the means afforded by the practice of securing exclusive privileges over individual dealers. But this competition tends to lessen competition between marketers, since every dealer who has but one equip-

ment is no longer a genuine potential factor in the competition between marketing companies.

It may be added that counsel in their brief, page 9, have omitted completely the second branch of the definition of unfair methods of competition laid down by this Court in the case of *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, namely, methods which have "dangerous tendency unduly to hinder competition or create monopoly." This grand division of unfair methods is introduced by the important word "or." They likewise ignore the law as similarly laid down in *Federal Trade Commission* v. *Beech-Nut Packing Company*, 42 Sup. Ct. Rep. 150. (See our brief in chief, pp. 51, 52.)

REPLY TO BRIEF OF MALONEY OIL & MANUFACTURING COMPANY.

Counsel for this respondent relies strongly on four opinions in as many Circuits of the United States Circuit Court of Appeals rendered in cases brought for the review of orders of the Commission relative to the practice in controversy. These were all adverse to the Commission.

The decision in *Standard Oil Company of New York* v. *Federal Trade Commission*, 273 Fed. 478, in our judgment contains certain clear errors.

The Court was wrong, we submit, in believing that the question of lessening of competition, of lawfulness, may turn upon that of "convenience to the public," "the ease with which motor drivers may obtain 'gas,'" protection to trade-marks. (Id. p. 480.)

If the practice tends to lessen competition it is unlawful by Act of Congress.

The Court erred also in that it held that the practice had the advantages just named (Id. p. 482) and also protected the brands of lessor company (Id. p. 480). The record clearly shows that many of the largest and smallest companies alike do not approve it, that it does not prevail in many sections wherein the automobile driving custom prevails to the highest degree. These supposed advantages are clearly spurious. The real motive underlying the practice is that of exclusive appropriation of each dealer to whom equipment is leased. (See our brief, pp. 52 to 64.)

The Court's position necessarily implies a holding that the advantages are attributable to the leasing with the restrictive covenant. This is error. The advantages are inherent in the equipment and not in the restriction. The equipments are used for the distribution of gasoline refined by companies which do not use the covenant as well as by those which do, and in sections where the practice does not prevail as well as where it does.

The Second Circuit also confounds competition to secure exclusive hold upon the retailers with genuine and lasting competition (Id. p. 482), but after the retailer has signed the lease he will use no other gasoline in the equipment and he has no use for another equipment. Competition between gasoline marketers is dead, so far as he is concerned and for the territory he can best supply.

Nor is the freedom of the retailer an "unfair and dishonest" thing as the Court supposes. (Id. p. 481.) The record shows without contradiction that where the retailer owns the pump he is honest about it and when he wishes to change to another marketing company he simply removes the sign or illuminated globe of the old supply company and puts up that of the new—a moment's undertaking. (Standard Rec. Vol. II, pp. 516, 517, 500, 493; Vol. III, pp. 33, 34.)

The Sixth Circuit in *Canfield Oil Company* v. *Federal Trade Commission* and five other cases (274 Fed. 581), concurred in the views of the Second Circuit, but deemed itself lacking in jurisdiction in that it held that interstate commerce was not involved.

Counsel for the Maloney Oil & Manufacturing Company clearly misapply this decision. The lease of pumping equipment is a local matter for local distribution, but it is part of a great interstate movement of gasoline. The leasing contracts necessitate importation from beyond State lines, and are, therefore, in interstate commerce. (See our opening brief, pp. 69–72.)

Hence the other respondents here have not raised the jurisdictional point. The stipulations in the Ohio group of cases which were before the Sixth Circuit are absent in the instant cases, and, quite to the contrary, as regards this respondent, there is an admission of importance in this relation. In its answer this company admits that it purchases its gasoline in various States and that the same is trans-

ported in interstate commerce and sold to various purchasers and that in its business of "selling such products the same are constantly moved from one State to another by the respondent, and there is conducted by respondent a constant current of trade in such products." (Maloney, Rec. Vol. I, p. —.)

This admission brings the respondent under the cases cited.

That the Seventh Circuit was in error in the cases of *Sinclair Refining Company* v. *Federal Trade Commission*, 276 Fed. 686, in holding that the Federal Trade Commission Act conferred jurisdiction "only where there are practices that amount to a fraud in regard to some public or private right" * * *, in effect, has recently been held by this court.

The Commission has power, irrespective of fraud, as held in *Federal Trade Commission* v. *Beech-nut Packing Company*, 42 Sup. Ct. Rep. 150, in the class of cases here in controversy. (See our opening brief, p. 52.)

Nor does the Commission arrogate to itself "the right to fix prices." The vice the Commission is striking at is the restrictive covenant. The gratuitous character of the loan is merely the means whereby the marketing corporations are enabled to secure the restrictive covenant. They are the inducement which enables the wrong to be perpetrated. It may be added in passing that the Commission departed from such findings as caused the Seventh Circuit to deem the point in issue to be that of a price fixing effort, and in its subsequent findings and

other cases here before the Court do not contain findings of the character criticised.

As regards the opinion in the cases of *Standard Oil Company* v. *Federal Trade Commission*, *The Gulf Refining Company* v. *Same*, and *Maloney Oil & Manufacturing Company* v. *Same*, 282 Fed. 81, our specification of errors on pages 22 and 23 has been fully made.

The Court is fundamentally wrong in its conception of "the tying element in the transaction." They deem it to be "one arising from human nature and business sense, namely, that the retailer will install no other outfit so long as he is satisfied with the quality and price of the wholesaler's gasoline, and so long as one outfit serves his trade."

It is clear that while the contract nominally leaves the lessee "perfectly free to deal in all petroleum products made by competing wholesalers" and while nominally he is "at liberty to install by lease or purchase as many other outfits as he may choose and to sell through them as many brands of gasoline as he may desire" (Id. p. 89), he has been placed by the restrictive covenant in a position where both parties know that the lessee will not install other equipment nor buy the equipment leased.

It is clear that most retailers do not have sufficient business to justify another equipment and it is folly for him to make investment in equipment which he can secure free. The record shows that when a retailer has leased a pump rival marketers do not solicit him for business and that station is closed for

all practical purposes to competition between gasoline companies.

The view of the minority of the court is clearly sound:

> The leases are now in force. The fact that they may be terminated at some future time is not relevant to the issue now under consideration, * * * thereby free competition among the wholesalers of gasoline has been and now is restricted, not with respect to an insignificant number of retailers, but with respect to a large majority thereof, and as effectually as if the leases were in perpetuity and as if they expressly prohibited the lessee from using or dealing in the gasoline of competitors of the respective lessors. (282 Fed. p. 89.)

We again respectfully submit that the judgments of the Courts below should be reversed and the Commission sustained in its orders.

JAMES M. BECK,
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W. H. FULLER,
Chief Counsel, Federal Trade Commission.
ADRIEN F. BUSICK,
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Of Counsel.

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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

FEDERAL TRADE COMMISSION, PETITIONER, *v.* SINCLAIR REFINING COMPANY, RESPONDENT.	No. 213.
FEDERAL TRADE COMMISSION, PETITIONER, *v.* STANDARD OIL COMPANY (NEW JERSEY), Respondent.	No. 637.
FEDERAL TRADE COMMISSION, PETITIONER, *v.* GULF REFINING COMPANY, RESPONDENT.	No. 638.
FEDERAL TRADE COMMISSION, PETITIONER, *v.* MALONEY OIL & MANUFACTURING COMPANY, Respondent.	No. 639.

REPLY BRIEF FOR PETITIONER.

LEASES PROHIBIT LESSEES FROM SELLING GASOLINE OF COMPETITORS.

The argument of counsel for the Standard Oil Company that the restrictive covenant contained in the leases does not bring it within the prohibition

of section 3 of the Clayton Act (Standard Oil brief, pp. 29–31) is not justified. The history of the *Henry* v. *The Dick Co.* litigation is, we believe, conclusive on the point and perhaps clearer than authorities cited in our opening brief, pages 27 to 29.

The Dick Company sold its stencil duplicating machines with the restriction that they should "be used only with a stencil, paper, ink, and other supplies made by A. B. Dick Company." (224 U. S. 25, 26.) The apparatus was patented but the supplies were unpatented.

This court upheld the license restriction. (*Henry* v. *A. B. Dick Company*, 224 U. S. 1.)

Congress was evidently of opinion that the case disclosed a flaw in the law and afforded opportunity for an assault upon competition, and this company was mentioned at length as one of the corporations whose practices were to be prohibited by section 3 of the Clayton Act. Chairman of the Judiciary Committee and sponsor for the bill believed that it would "correct the conditions referred to by Chief Justice White in the Dick case" and was in favor of repealing the opinion in the case of *Dick* v. *Henry*. (Cong. Rec., 63d Cong., 2d sess., p. 17, 1823.)

This court has quoted the language we invoke herein and has declared that Congress has enacted section 3 of the Clayton Act "as if in response to" the decision in *Henry* v. *Dick Company*, 224 U. S. 1. (*Motion Picture Co.* v. *Universal Film Co.*, 243 U. S. 502, 517.)

We believe that the equipment leased herein and the stencil-duplicating equipment leased by the Dick Company are absolutely identical in legal status. No doubt exists but that the customers of the Dick Company might have another duplicating outfit purchased from another manufacturer and use supplies of a competitor of the Dick Company therewith. Probably some such purchasers did have a second and competing equipment with competing supplies, just as a small proportion of the gasoline curb stations have a second equipment either owned by the retailers or leased by another company, but in both cases alike the majority of customers no doubt had no such second equipment, and therefore were effectively tied by the restrictive covenant in the lease.

There is not a shade of distinction between the practice in stencil duplicating and in the gasoline trades. Counsel for the Standard Oil Company are, therefore, endeavoring to avoid the express intent of Congress embodied in the Clayton law.

Further mention need be made of the Standard Fashion-Magrane Houston case only to point out that while the covenant therein was in *terms* limited to the particular premises, yet this court after stating that it did not appear that the dealer had any place at which to sell patterns, held that "the *covenant*, read in the light of the circumstances in which it was made, is one by which the purchaser agreed not to sell any other make of patterns while the contract was in force."

Attention is invited to the fact that the court did not hold that there was an understanding or agreement *collateral* to the main contract by which the dealer agreed not to sell other patterns; but that the *covenant itself* was one by which the dealer agreed not to sell other patterns. A similar conclusion was reached by this court in the United Shoe Machinery Company case. These decisions determine that the covenant, though in express terms limited to one place, or to one set of equipment, or one machine (supra), will be held to prohibit the covenantee from dealing in other goods if from the surrounding facts this is its necessary effect.

If petitioner's contention on this point is sound, then the charge in the complaint that the equipment is leased on the condition, agreement, or understanding that the lessee "shall not purchase or deal in the products of a competitor or competitors of the respondent" was the proper allegation and not an allegation in the words of the covenant itself.

CONTENTION THAT LEASES HAVE INCREASED COMPETITION.

Respondent contends that refiners and wholesalers have induced the entry of more retailers into the trade and have therefore by the use of the practice increased competition. This contention was anticipated in part in petitioner's brief in chief, pages 44 to 47. It may be added, however, that respondent's contention appears to be that because the brands of the various refiners or wholesalers are

displayed at more retail stations and prices quoted their competition is increased. In other words that if there is competition between retailers, elimination of competition between refiners and wholesalers does not violate the statute.

Exactly the reverse of this contention was made in the case of *Dr. Miles Medical Company* v. *Parke & Sons Co.* (220 U. S. 373), where it was contended that competition between manufacturers was all that was necessary to protect the public, and that competition between wholesalers and retailers might be eliminated. This court held, however, that the public was entitled to such competition as could be had between wholesalers and retailers as well as manufacturers.

Similarly, in the case at bar, the statute sought to preserve competition in price, quality, and service between refiners and wholesalers, as well as between retailers. Indeed, the existence of jurisdiction in the Federal Government over competition between retailers being doubtful, the statute is obviously primarily concerned with competition between manufacturers and wholesalers.

Furthermore, proof that during the period covered by the evidence there has been a substantial increase in the number of refiners and wholesale dealers does not necessarily prove increased competition. In a period when consumption of gasoline increased tenfold in five years it would have been remarkable if some new companies had not entered the field, but whether

these companies materially increased competition would depend upon the conditions under which they do business. Certainly, the record here shows that there are thousands of retail dealers to whom these new companies could not sell because of leases of existing companies.

Whether there be increased or lessened competition resulting from a practice must depend upon whether the aggregate of the competition for the trade of each individual customer has increased or diminished. In the present controversy the competition among marketers for the trade of tens of thousands of retailing customers has been absolutely destroyed, by the practice herein challenged, for the duration of each respective lease.

REPLY TO RESPONDENT'S STATEMENT OF FACTS.

Opposing counsel have given what purports to be an outline of the testimony of certain witnesses, on pages 34 to 41, inclusive. This résumé will not bear analysis.

They quote several witnesses to the effect that the practice of loaning with restrictive covenant came into vogue at the same time with the use of the improved equipment loaned. This is inaccurate evidence, or, strictly speaking, it is evidence of a situation limited historically to a small part of the country. It may be that in a few districts along the Atlantic seaboard the leasing with restrictive covenant grew up at about the time the improved equipment came on the market; but the record includes the testimony

of some fifteen representatives in Atlantic coast States of pump and tank manufacturing houses. These men prove that the equipment business had antedated and been in flourishing condition before the loaning thereof with restrictive covenant had gained any headway. (Vol. 2, pp. 82–166; 240–253; 367-388.) The leasing and loaning practice has since to a large degree reduced the sales of equipment to the companies marketing gasoline in the Eastern States to bulk sales for leasing purposes.

It will be borne in mind that in Ohio and the eastern Mississippi Valley the practice was introduced at a considerably later date, whereas between the Mississippi and the Rocky Mountains it had not, when the testimony closed, proceeded to any great degree. (Record, Vol. III, 241.)

When to this is added the fact that in Pennsylvania and Delaware the local member of the Standard Oil group, when the record closed, was still selling four-fifths of its equipment and could sell in the other one-fifth of instances were it not that the gratuitous loaning practice is well known there, and when it is further added that the greatest gasoline distributing organization in the world, the Standard Oil of Indiana, regards the practice as indefensible, and when it is recalled that the numerous small companies in all the records condemned the practice, we submit that there is not the slightest reason for believing that there is any need of a restrictive covenant in order to secure adequate installation, sufficient outlets for the product, public convenience or safety,

protection to brands, facilities for advertising, or any of the things which, we believe as subterfuges, have been alleged as the excuses for the tying up of tens of thousands of retail dealers in the eastern third of the United States.

Surely the Standard Oil Company of New Jersey, and that of New York, the Texas Company, the Gulf Refining Company, and the Sinclair Company are no more fond of advertising, nor do their brands require protection other than a removal of sign when the retail dealer changes refiners, if the other great companies mentioned do not feel the need of such protection. (See our opening brief, pp. 52–64.)

In view of opposing counsel's recitation of the evidence, we wish to add a few words with regard to the small gasoline marketer. The commission holds no brief for the small as contrasted with the great company. The line of cleavage leaves some small companies on one side of the law and some on the other, just as the great companies are divided.

Certain small companies, it is shown by the record, have been just as desirous to secure an exclusive string of retail stations for their distributing tank wagons. Several of them, in this record, pleaded for the privilege of effectually restricting dealers to their own product in order to hold the territory against the great company.

But the Clayton Act, the Federal Trade Commission Act, and the decisions of the commission do not discriminate in favor of the small as against the great trader, and the little men have no more right to

restrict the great marketer than the great have to restrict the less. The public have the paramount right, to wit, that of not having retailers, wholesalers, or middlemen freed from competition by the employment of leases which, under the circumstances, directly operate to lessen competition.

The loaning practice with restrictive covenant may have been, during the period when gasoline consumption was increasing by leaps and bounds, a convenient means for companies, including numerous small ones, to enter fields not fully occupied.

But the time will arrive, perhaps shortly, when there will no longer be an unabsorbed increment of demand constantly inviting the marketer, but, on the contrary, there will ensue in this line, as in others, a comparatively stabilized situation when there will be approximately as many retailers in any given district as there is any business demand for.

If these retailers be subject to exclusive covenant, the company attempting to enter such field will be unable to secure tank-truck routes, since prospective retailers can not enter a field fully occupied, nor will existing retailers install additional equipment for which they have no need.

When such time arrives and the existing tanks and pumps are all subject to exclusive leases, competition will be confined to companies already in any such district and such residuum of competition will be dormant, for the reason that each company

will be free from any competitive influence operating upon its own retailers.

This, we believe, constitutes a substantial and dangerous hindering and lessening of competition within the meaning of section 3 of the Clayton Act and section 5 of the Federal Trade Commission Act.

We have urged most forcibly section 3 of the Clayton Act for the reason that we believe that therein, under construction of this court, Congress has specifically prohibited the practice in question. If, however, by using phraseology which seems to fall short of, though in view of the circumstances it really effects, a complete prohibition of the use of the product of a competitor the respondents be held to escape the letter of the Clayton Act, they still violate the Federal Trade Commission Act.

The latter act is intended to protect the public against methods which tend to lessen competition or to create a monopoly. (*Federal Trade Commission* v. *Beech-Nut Packing Co.*, 42 Sup. Ct. Rep. 150.) Practices which tend to that end if within the spirit of the two enactments, are subject to the order of the petitioner under the Federal Trade Commission Act.

JAMES M. BECK,
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W. H. FULLER,
Chief Counsel, Federal Trade Commission.
ADRIEN F. BUSICK,
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Of Counsel.

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2. Nor is it unfair competition, within the Federal Trade Commission Act, as regards either the trade in gasoline or the trade in such storage and pumping equipment. P. 474.
3. The Federal Trade Commission has no general authority to compel competitors to a common level, to interfere with ordinary business methods, or to restrict competition to arbitrary standards. P. 475.
4. The great purpose of both of the above statutes was to advance the public interest by securing fair opportunity for the play of contending forces engendered by an honest desire for gain; and to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs. P. 476.

276 Fed. 686; 282 Fed. 81, affirmed.

CERTIORARI to four judgments of Circuit Courts of Appeals setting aside as many orders of the Federal Trade Commission.

Mr. Adrien F. Busick and *Mr. Eugene W. Burr*, with whom *Mr. Solicitor General Beck* and *Mr. W. H. Fuller* were on the briefs, for petitioner.

Mr. Roy T. Osborn, with whom *Mr. Edw. H. Chandler* and *Mr. W. Ray Allen* were on the brief, for respondent in No. 213.

Mr. Charles D. Chamberlin, with whom *Mr. Hubert B. Fuller* was on the brief, for respondent in No. 639.

Mr. R. L. Batts, with whom *Mr. W. J. Guthrie* was on the brief, for respondent in No. 638.

Mr. Chester O. Swain and *Mr. James H. Hayes*, for respondent in No. 637, submitted.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

In separate proceedings against thirty or more refiners and wholesalers, the Federal Trade Commission condemned and ordered them to abandon the practice of leas-

ing underground tanks with pumps to retail dealers at nominal prices and upon condition that the equipment should be used only with gasoline supplied by the lessor. Four of these orders were held invalid by the circuit courts of appeals for the third and seventh circuits in the above entitled causes—276 Fed. 686; 282 Fed. 81; and like ones have been set aside by the circuit courts of appeals for the second and sixth circuits—*Standard Oil Co.* v. *Federal Trade Commission,* 273 Fed. 478; *Canfield Oil Co.* v. *Federal Trade Commission,* 274 Fed. 571. The proceedings, essential facts and points of law disclosed by the four records now before us are so similar that it will suffice to consider No. 213, as typical of all.

July 18, 1919, the Commission issued a complaint charging that respondent, Sinclair Refining Company, was purchasing and selling refined oil and gasoline and leasing and loaning storage tanks and pumps as part of interstate commerce in competition with numerous other concerns similarly engaged; and that it was violating both the Federal Trade Commission Act, 38 Stat. 717, and the Clayton Act, 38 Stat. 730.

The particular facts relied on to show violation of the Federal Trade Commission Act are thus alleged—

" Paragraph Three. That respondent in the conduct of its business, as aforesaid, with the effect of stifling and suppressing competition in the sale of the aforesaid products and in the sale, leasing, or loaning of the aforesaid devices and other equipments for storing and handling the same, and with the effect of injuring competitors who sell such products and devices, has within the four years last past sold, leased, or loaned and now sells, leases, or loans the said devices and their equipment for prices or considerations which do not represent reasonable returns on the investments in such devices and their equipments; that many such sales, leases, or loans of the aforesaid devices are made at prices below the cost of producing and vend-

ing the same; that many of such contracts for the lease or loan of such devices and their equipments provide or are entered into with the understanding that the lessee or borrower shall not place in such devices, or use in connection with such devices and their equipments, any refined oil or gasoline of a competitor; that only a small proportion of the dealers in gasoline and refined oil under such agreements and understandings deal also in similar products of respondent's competitors and that only a small proportion of such dealers require or use more than a single pump outfit in the conduct of their said business; that there are numerous competitors in the sale of such products who are unable to enter into such lease agreements or understandings because of the large amount of investment required to carry out such lease agreements as a competitive method of selling refined oil and gasoline; that there are numerous other competitors of respondent engaged in the manufacture and sale of devices and their equipments who do not deal in refined oil and gasoline, and therefore do not sell or lease said devices and their equipments for a nominal consideration on a condition or understanding that their products only are to be used therein; that the said numerous competitors who were unable to enter into such lease agreements or understandings, as aforesaid, have lost numerous customers in the sale of refined oil and gasoline to respondent because of the business practices of respondent hereinbefore set forth. That the said numerous other competitors of respondent who manufacture and sell said devices and their equipments, but do not sell refined oil and gasoline, as aforesaid, have lost numerous customers and prospective customers for the purchase of their devices and equipments because of the said business practices of respondent, as hereinbefore set forth."

To show violation of the Clayton Act the complaint alleged—

" Paragraph Three. That the respondent, for four years last past, in the conduct of its business as aforesaid, has leased and made contracts for the lease and is now leasing and making contracts for the lease of said devices and their equipments to be used within the United States, and has fixed and is now fixing the price charged therefor on the condition, agreement, or understanding that the lessees thereof shall not purchase or deal in the products of a competitor or competitors of respondent; and that the effect of such leases or contracts for lease, and conditions, agreements, or understandings, may be and is to substantially lessen competition and tend to create a monopoly in the territories and localities where such contracts are operative."

Respondent answered and evidence was taken. In October, 1919, the Commission announced its report, findings and conclusions, the substance of which follows.

" 1. That the respondent is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maine, with its principal business office located at the City of Chicago, in the State of Illinois, and is now and has been engaged in the business of purchasing and selling refined oil and gasoline, hereinafter referred to as products, and is largely engaged in refining crude petroleum, and that it is now and has been since January 25, 1917, in connection with the aforementioned business, engaged in the leasing and loaning, but not in the manufacture, of oil pumps, storage tanks, and containers and their equipment, hereinafter referred to as devices, in various States of the United States, but not in the District of Columbia, in competition with numerous other persons, firms, corporations, and copartnerships similarly engaged; that prior to the 25th day of January, 1917, the corporate name of respondent was the Cudahy Refining Company.

" 2. That the respondent, in the conduct of its business, as aforesaid, and as hereinafter more particularly de-

scribed, extensively refines petroleum and its products and purchases refined oil and gasoline, all hereinafter referred to as 'products,' and also purchases oil pumps, storage tanks or containers, hereinafter referred to as 'devices,' the said devices being used to contain said products, the said products and devices then being handled and stored in the various States of the United States and being transported in interstate commerce; that the aforesaid products are sold and the aforesaid devices are leased or loaned by respondent to various persons, firms, corporations, and copartnerships; that in the conduct of its business of purchasing and selling such products and selling, leasing or loaning such devices, the same are constantly moved from one State to another by respondent and there is conducted by respondent a constant current of trade in such products and devices between various States of the United States; that there are numerous competitors of respondent, who, in the conduct of their business in competition with respondent, purchase similar products and purchase and manufacture similar devices, the said devices being used to contain said products, the said products and devices then being handled and stored in the various States of the United States and transported in interstate commerce; that the aforesaid products are sold and the aforesaid devices sold, leased, or loaned by such competitors of respondent to various persons, firms, corporations, and copartnerships, that in the conduct of their business, as aforesaid, competitors of respondent constantly move such products and devices from one State to another and there is conducted by said competitors a constant current of trade in such products and devices between the various States of the United States; that respondent has conducted its said business in a similar manner to that above described since January 25, 1917.

"3. That respondent now leases and loans and has for the period of its business existence leased and loaned

devices and equipment for storing and handling its products, and that the monetary considerations received by respondent do not represent reasonable returns upon the investment in such devices and equipment; and also that such leases and loans of said devices and equipment are made for monetary considerations below the cost of purchasing and vending the same when the business of leasing or loaning said devices and equipment and the returns received thereon are considered separate and apart from the general business and sales policy of the respondent; that respondent's form of contract with the users of such devices and equipment provides in substance that the devices and equipment shall be used for the sole purpose of storing and handling gasoline supplied by respondent, and that the uniform contract used by respondent for leasing such devices and equipment is in form, tenor, and substance as follows." [The ordinary form of contract (printed in the margin [1]) is here set out. It recites the

[1] Equipment Contract.

This agreement, made and entered into this.....day of ....., 19...., between Sinclair Refining Company of ....., party of the first part, and ....., of the City of....., State of ....., party of the second part, witnesseth:

Whereas, party of the second part is now being supplied with gasoline by the party of the first part and desires to install on his premises situated at.....the following equipment for the better storing and handling of such gasoline:.....

Now, therefore, in consideration of the premises and of the sum of one dollar by the party of the second part to the party of the first part (the receipt of which is hereby acknowledged), the above named parties do hereby agree as follows:

1. The above described equipment shall be used by the party of the second part for the sole purpose of storing and handling the gasoline supplied by the party of the first part.

2. The party of the second part agrees, at his own cost, to maintain said equipment in good condition and repair so long as he shall continue to use the same.

3. The party of the second part agrees that he will not encumber or remove said equipment, or do or suffer to be done anything

customer's desire to install certain equipment and, among other things, provides that this shall be used only for storing and handling gasoline supplied by the lessor; that

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whereby said equipment or any part thereof may be seized, taken on execution, attached, destroyed or injured, or by which the title of the party of the first part thereto may in any way be altered, destroyed or prejudiced.

4. In the event party of the second part should at any time use said equipment for any other purpose than the storing and handling of gasoline supplied by the party of the first part, or should cease for.....days to handle gasoline secured from the party of the first part the right or license of the party of the second part to said equipment shall at once terminate, and thereupon the party of the first part shall have the right to enter upon said premises and remove said equipment and every part thereof.

5. The party of the second part shall indemnify and save harmless the party of the first part to and from any liability for loss, damage, injury or other casualty to persons or property caused or occasioned by any leakage, fire or explosion of gasoline stored in said tank or drawn through said pump.

6. This agreement shall terminate forthwith upon the sale or other disposition of said premises by party of the second part, and in any event upon the expiration of.....months from the date hereof; and in the event that by mutual consent said equipment remains in the possession of the party of the second part at the expiration of said period, it is agreed that the same shall be used by party of the second part subject to all of the terms and conditions of this agreement, and such may be terminated at any time after the expiration of.....months from the date hereof by the party of the first part giving ten days' notice to that effect. Upon the termination of this license by whatever means effected, the party of the first part shall have the right to enter upon said premises and remove the said equipment and each and every part thereof; provided, however, that the party of the second part shall have the right and option at such time to purchase said equipment by paying therefor the sum of .....

This contract is executed in triplicate, and it is agreed that the contract held by the party of the first part is to be considered the original and to be the binding agreement in case the duplicate varies from it in any particular.

In witness whereof, the parties hereto have caused this agreement to be executed the day and year first above written.

if put to any other use the lessee's right therein shall terminate; and that upon termination of the lease, by whatever means effected, the lessee may purchase the equipment for a specific sum.]

"4. That the contracts mentioned in the preceding paragraph also provide that such equipments shall be used by the lessee only for the purpose of holding and storing the respondent's petroleum products; that a small proportion of such lessees handle similar products of respondent's competitors; and that only a small proportion of such lessees as handle similar products of respondent's competitors require or use more than a single pump outfit in the conduct of their said business; that the practice of leasing such devices requires a large capital investment; that many competitors of respondent do not possess sufficient capital and are not able to purchase and lease devices as respondent does as aforesaid, partly by reason of which such competitors have lost numerous customers to respondent; that the effect of the practice of leasing by contract such equipments, where such contracts contain the said provision restricting the use of the same to the storage and handling of respondent's products as aforesaid, may be to substantially lessen competition and tend to create for the respondent a monoply in the business of selling petroleum products.

"*Conclusions.* That the methods of competition and the business practices set forth in the foregoing findings as to the facts are, under the circumstances set forth herein, unfair methods of competition, in interstate commerce, in violation of the provisions of section 5 of an act of Congress, approved September 26, 1914, entitled 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' and are in violation of section 3 of an act of Congress, approved October 15, 1914, entitled 'An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes.' "

Thereupon the Commission ordered that respondent cease and desist from—

"1. Directly or indirectly leasing pumps or tanks or both and their equipments for storing and handling petroleum products in the furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of the same after making due allowance for depreciation and other items usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom, and from doing any matter or thing which would have the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made.

"2. Entering into contracts or agreements with dealers of its petroleum products or from continuing to operate under any contract or agreement already entered into whereby such dealers agree or have an understanding that as a consideration for the leasing to them of such pumps and tanks and their equipments the same shall be used only for storing or handling the products of respondent, and from doing anything having the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made."

The Clayton Act provides—

"SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, sup-

plies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Respondent's written contract does not undertake to limit the lessee's right to use or deal in the goods of a competitor of the lessor, but leaves him free to follow his own judgment. It is not properly described by the complaint and is not within the letter of the Clayton Act. But counsel for the Commission insist that inasmuch as lessees generally—except garage men in the larger places—will not encumber themselves with more than one equipment, the practical effect of the restrictive covenant is to confine most dealers to the products of their lessors; and we are asked to hold that, read in the light of these facts, the contract falls within the condemnation of the statute. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, and *United Shoe Machinery Corporation* v *United States*, 258 U. S. 451, are relied upon.

In the *Standard Fashion Co. Case* the purchaser expressly agreed not to sell or permit sale of any other make of patterns on its premises. It had a retail store in Boston and sales elsewhere were not within contemplation of the parties. This Court construed the contract as embodying an undertaking not to sell other patterns. In *United Shoe Machinery Corporation* v. *United States*, when speaking of certain "tying" restrictions, this Court said—

"While the clauses enjoined do not contain specific agreements not to use the machinery of a competitor of the lessor, the practical effect of these drastic provisions is to prevent such use. We can entertain no doubt that such provisions as were enjoined are embraced in the broad terms of the Clayton Act which cover all condi-

FEDERAL TRADE COMMISSION *v.* SINCLAIR REFINING COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FEDERAL TRADE COMMISSION *v.* STANDARD OIL COMPANY (NEW JERSEY).

FEDERAL TRADE COMMISSION *v.* GULF REFINING COMPANY.

FEDERAL TRADE COMMISSION *v.* MALONEY OIL & MANUFACTURING COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Nos. 213, 637, 638, 639. Argued March 8, 9, 1923.—Decided April 9, 1923.

1. The practice, upon the part of a manufacturer of gasoline, of leasing underground tanks with pumps to retail dealers, at nominal rentals and upon condition that the equipment shall be used only with gasoline supplied by the lessor, is not in violation of the Clayton Act. P. 473.

tions, agreements or understandings of this nature. That such restrictive and tying agreements must necessarily lessen competition and tend to monopoly is, we believe, equally apparent. When it is considered that the United Company occupies a dominating position in supplying shoe machinery of the classes involved, these covenants signed by the lessee and binding upon him effectually prevent him from acquiring the machinery of a competitor of the lessor except at the risk of forfeiting the right to use the machines furnished by the United Company which may be absolutely essential to the prosecution and success of his business. This system of 'tying' restrictions is quite as effective as express covenants could be and practically compels the use of the machinery of the lessor except upon risks which manufacturers will not willingly incur."

There is no covenant in the present contract which obligates the lessee not to sell the goods of another; and its language cannot be so construed. Neither the findings nor the evidence show circumstances similar to those surrounding the "tying" covenants of the Shoe Machinery Company. Many competitors seek to sell excellent brands of gasoline and no one of them is essential to the retail business. The lessee is free to buy wherever he chooses; he may freely accept and use as many pumps as he wishes and may discontinue any or all of them. He may carry on business as his judgment dictates and his means permit, save only that he cannot use the lessor's equipment for dispensing another's brand. By investing a comparatively small sum, he can buy an outfit and use it without hindrance. He can have respondent's gasoline, with the pump or without the pump, and many competitors seek to supply his needs.

The cases relied upon are not controlling.

Is the challenged practice an unfair method of competition within the meaning of § 5 of the Federal Trade

Commission Act?[1] Reviewing the circumstances, four circuit courts of appeals have answered, no. And we can find no sufficient reason for a contrary conclusion. Certainly the practice is not opposed to good morals because characterized by deception, bad faith, fraud or oppression. *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 427. It has been openly adopted by many competing concerns. Some dealers regard it as the best practical method of preserving the integrity of their brands and securing wide distribution. Some think it is undesirable. The devices are not expensive—$300 to $500—can be purchased readily of makers and, while convenient, they are not essential. The contract, open and fair upon its face, provides an unconstrained recipient with free receptacle and pump for storing, dispensing, advertising and protecting the lessor's brand. The stuff is highly inflammable and the method of handling it is important to the refiner. He is also vitally interested in putting his brand within easy reach of consumers with ample assurance of its genuineness. No purpose or power to acquire unlawful monopoly has been disclosed, and the record does not show that the probable effect of the practice will be unduly to lessen competition. Upon the contrary, it appears to have promoted the public convenience by inducing many small dealers to enter the business and put gasoline on sale at the crossroads.

The powers of the Commission are limited by the statutes. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those en-

[1] Sec. 5. That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

gaged in the conflict for advantage called competition. The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs.

The suggestion that the assailed practice is unfair because of its effect upon the sale of pumps by their makers is sterile and requires no serious discussion.

The judgments below must be

Affirmed.